

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

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TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
JANUARY 4, 2010
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

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WITNESSES ON BEHALF OF THE DEFENDANTS

EARL SMITH, JR.

Direct Examination by Mr. Bassett

9462

Cross-Examination by Mr. Nance

9564

1 Monday, January 4, 2010

2 * * * * *

3 THE COURT: A question.

4 MS. VIGLUCCI LOPEZ: Good morning, Your
5 Honor.

6 THE COURT: Good morning.

7 MS. VIGLUCCI LOPEZ: Happy 2010.

8 THE COURT: Decided to join Mr. Nance.
9 It's getting cold.

10 MR. NANCE: Looks very good, Your
11 Honor.

12 MS. VIGLUCCI LOPEZ: I wish I could join
13 you in that. I'm here -- Cara Viglucci Lopez -- on
14 behalf of the Tyson defendants just to make a request
15 of the court to rule on the objections of the
16 deposition of Terry Peach, taken April 9th -- April
17 10th, 2009, at the court's convenience, but the
18 defendants would like to use that as early as next
19 week.

20 THE COURT: Thank you very much.

21 MS. VIGLUCCI LOPEZ: Thank you.

22 THE COURT: Who's our next witness?

23 MR. BASSETT: Your Honor, the defendants
24 would call Earl Smith. Mr. Smith.

25

1 **EARL SMITH, JR.,**
2 ***after having been first duly sworn, says in reply to***
3 ***the questions propounded as follows, to-wit:***

4 THE COURT: State your full name for the
5 record, please, sir.

6 THE WITNESS: Earl Travis Smith, Jr.

7 THE COURT: Mr. Bassett, you may
8 inquire.

9 MR. BASSETT: Your Honor, may I
10 approach?

11 THE COURT: You may, sir.

12 MR. BASSETT: Judge, I do like the
13 beard. If I had the capability to grow one, I think I
14 would too. Happy New Year to Your Honor and Happy New
15 Year to counsel.

16 **DIRECT EXAMINATION**

17 **BY MR. BASSETT:**

18 Q. Mr. Smith, where are you employed?

19 A. I'm employed by the Arkansas Natural
20 Resources Commission.

21 Q. And what is your position at that agency?

22 A. I'm chief of the water management division.

23 Q. Is the Arkansas Natural Resources Commission
24 an Arkansas state agency?

25 A. It is.

1 Q. Has the agency ever had another name?

2 A. Yes. Previously, we were known as the
3 Arkansas Soil and Water Conservation Commission.

4 Q. Okay. And when did that name-change occur?

5 A. It's been about six years ago, I guess.

6 Q. Okay. How long have you been employed at the
7 agency, Mr. Smith?

8 A. Since 1985.

9 Q. When you were hired there in 1985, what was
10 your position at what was then called the Arkansas
11 Water and Soil Commission?

12 A. I was engineering supervisor in the water
13 planning division.

14 Q. Have you held any other positions since then
15 in the agency?

16 A. Yes. I was subsequently promoted to the
17 chief of the water management division.

18 Q. Is there a difference between the water
19 planning division and the water management division?

20 A. Yeah. The water -- the water planning is a
21 section of the division that encompasses other
22 sections in our water management division.

23 Q. And when did you become chief of that
24 division?

25 A. Oh, gosh. It's been ten, fifteen years ago,

1 something like that.

2 Q. Mr. Smith, when you began at the Arkansas
3 Soil and Water Commission in 1985, what did your
4 division have responsibility for?

5 A. In the water planning section there, was
6 responsible for water planning, looking at the water
7 resources of the state, trying to make projections
8 about our water use-type things for future planning,
9 make sure we had sufficient water for the state.

10 We also worked with some of the federal
11 agencies on water project water development projects
12 and that sort of thing. My section also contained the
13 dam safety and flood plain management responsibilities
14 of the state.

15 Q. Did your agency have any responsibility in
16 the 1980s for nonpoint-source management?

17 A. No.

18 Q. In the mid and late 1980s, Mr. Smith, was
19 there any legislation or other legal authority that
20 provided your agency with regulatory authority over
21 nonpoint-sources?

22 A. No.

23 Q. Okay. Now, let's talk for a moment, if we
24 could, about the Arkansas-Oklahoma Arkansas River
25 Compact Commission.

1 Would you briefly explain for the record what
2 that is?

3 A. Well, it's a compact between Arkansas and
4 Oklahoma. It required federal legislation to form the
5 compact as well as state legislation to form the
6 compact. It basically looks at the apportionment of
7 the water in the compacted area of the states --
8 between the two states, apportions the flow in the
9 subwatersheds. It also speaks to some of the water
10 quality aspects of the area.

11 Q. And did that commission meet annually?

12 A. It does.

13 Q. All right. And did you have any involvement
14 with the Compact Commission as part of your duties at
15 the Arkansas Soil and Water Commission in the mid to
16 late 1980s?

17 A. Yes. I've been a member of the engineering
18 committee of that Compact since that time.

19 Q. And as a member of the engineering committee,
20 did you attend all the meetings?

21 A. I did.

22 Q. All right. What purpose, Mr. Smith, did the
23 engineering committee have with respect to the Compact
24 Commission in the 1980s?

25 A. Well, the Compact has within its structure

1 several committees in which the commissioners can
2 assign items to discuss and bring back to them, assign
3 questions or assignments to work on and respond back
4 to them. That was our main function, was to provide
5 technical support and be able to answer different
6 items that were assigned to us to report back to the
7 commissioners.

8 Q. In respect to your involvement with the
9 Compact Commission in the mid to late 1980s, do you
10 know whether there was a particular nutrient that was
11 a concern over others?

12 A. Well, back in the 1980s, that far back,
13 nitrogen was the primary element of concern when you
14 were looking, for example, at trying to decide on
15 fertilizer rates that you were -- that you were
16 spreading. That far back nitrogen was the primary
17 element of concern.

18 Q. Okay, sir. Did you continue to serve on the
19 engineering committee of the Compact Commission into
20 the early 1990s?

21 A. I did.

22 Q. All right. And did the Compact Commission
23 adopt any kind of nutrient-reduction goals that
24 affected any part of the Illinois River Watershed
25 during the time frame of the early 1990s?

1 A. In 1997, the Compact did adopt a
2 nutrient-reduction goal.

3 Q. And what was the goal adopted by the Compact
4 Commission?

5 A. The goal was to try to achieve a 40 percent
6 reduction in phosphorus from the annual loading of the
7 river.

8 Q. Okay. And that goal was adopted, as you
9 said, in 1997?

10 A. That's my memory, yes, sir.

11 Q. Okay. Was this goal focused on any
12 particular source or sources of phosphorus or was it
13 just total loading?

14 A. We were concerned with total loading of the
15 river and total loading on it.

16 Q. Okay. And was this a goal that was set for
17 the IRW?

18 A. It was. And the basis for that goal was the
19 Clean Lakes study on Lake Tenkiller that was done by
20 EPA and Oklahoma state.

21 Q. Okay. Did Oklahoma officials approach
22 Arkansas officials about the 40 percent goal
23 reduction?

24 A. The genesis of that was Oklahoma requested
25 that the commission adopt that goal.

1 Q. Did the Compact Commission include officials
2 from both the states of Arkansas and Oklahoma?

3 A. It does. It's made up by appointees by the
4 governor of the states with a federal chairman that's
5 appointed by the President.

6 Q. All right. Has that goal that you just
7 referenced ever been changed by the Compact Commission
8 since it was first adopted?

9 A. No, sir. It's still in effect.

10 Q. All right. What role, Mr. Smith, if any, did
11 your engineering committee play with regard to the 40
12 percent goal of the Compact Commission?

13 A. Well, once the goal was adopted, then one of
14 the assignments that was made to the engineering
15 committee was to -- how are we going to monitor
16 progress toward making that goal? So one of our first
17 points was to decide how we were going to portray
18 that, how we are going to see if progress was made
19 toward that goal.

20 So what the engineering committee did was
21 ultimately we decided to select monitoring sites in
22 Arkansas and Oklahoma. We chose four sites in
23 Arkansas and we chose four sites in Oklahoma. We were
24 to take -- we decided we would monitor those points,
25 continue the sampling in the same manner that the

1 Clean Lakes study monitoring was done, and this was so
2 we could compare apples to apples, compare the results
3 of those monitoring stations to the study that was
4 done and the conclusions that were reached in
5 that -- in that Clean Lakes study.

6 Q. Do you know, Mr. Smith, if the monitoring was
7 done at the same frequencies and intervals as the EPA
8 had done?

9 A. It was. We were careful to make sure that
10 the procedures -- everything was done in accordance
11 with the same way the regimes that were done with
12 that -- the data from 1980 to '93 that was considered
13 in the Tenkiller report because we wanted a direct
14 comparison.

15 Q. Now, I think you've already referenced this,
16 and forgive me if I'm being repetitious. It's a bad
17 habit I have from time to time, part of the trade, I
18 guess. Did the Arkansas officials, including you,
19 that were on this Compact Commission, select the four
20 sites in Arkansas for monitoring?

21 A. Well, it was done through the committee. But
22 yes, they were selected.

23 Q. And were four sites selected on the Oklahoma
24 side?

25 A. They were.

1 Q. Okay. And were those sites on the Oklahoma
2 side selected by the Oklahoma officials on the
3 commission?

4 A. They were.

5 Q. All right. Did your engineering group or
6 your agency actually do the monitoring itself after
7 those sites and protocols were selected?

8 A. No. There again, what we were doing was
9 careful to utilize the same regimes as much as we can
10 for sampling. So the sampling was in accordance with
11 the same procedures that our department -- our DEQ,
12 Department of Environmental Quality, had done for that
13 same time frame.

14 Q. Now, at about this same time, Mr. Smith, did
15 your agency decide to do any additional intensive
16 monitoring in the IRW aside from the monitoring that
17 was being done for the Compact Commission reduction
18 goal?

19 A. We did. By this time, there was, of course,
20 quite a bit of interest as phosphorus as a nutrient in
21 the watershed as well as others, so we felt that it
22 would be well to gather some intensive data. So we
23 contracted with the University of Arkansas to
24 establish a monitoring point to do some rigorous and
25 real intensive sampling at the state line in order to

1 have a little better understanding of things like
2 flow -- a little better understanding of how flow
3 regimes might enter into the picture as well as
4 some -- perhaps some idea of the fate of phosphorus in
5 the watershed itself.

6 Q. And was this monitoring for total loading?

7 A. We -- we monitored for total loading as well
8 as a suite of other elements that we tested for, but
9 total loading was one thing that we did test for.

10 Q. So would that include both point and nonpoint
11 sources?

12 A. It certainly would. That point of the river,
13 the contribution that you're sampling, are both from
14 point source as well as nonpoint elements.

15 Q. All right. What involvement, if any, did the
16 Arkansas Department of Environmental Quality have in
17 attempting to reach the 40 percent reduction goal?

18 A. Well, when we were looking at the goal, since
19 we were looking at point and nonpoint sources by this
20 time, my agency had become the lead agency for the
21 nonpoint program in Arkansas. DEQ then looked at what
22 we could do with point sources. So we -- then we
23 moved toward that regime of reducing the phosphorus
24 discharges to a part for the municipal treatment
25 sources.

1 Q. Was your committee and the full Compact
2 Commission periodically advised of the status of the
3 project and whether any strides were being made toward
4 the goal?

5 A. We did an annual report to the commissioners
6 on progress toward making that goal.

7 Q. And was progress made towards the 40 percent
8 reduction in nutrients goal?

9 A. We were quite pleased that we had been able
10 to achieve progress toward that goal, we were.

11 Q. Okay. Mr. Smith, if you would -- you have a
12 packet up there -- if you would pull out what's been
13 marked as Joint Defendants' Exhibit No. 3573, please.
14 Do you have it there, sir?

15 A. I do.

16 Q. All right. If you would take a look at that.
17 Do you recognize that document?

18 A. Yes. It's one of the annual reports that was
19 prepared for the Compact commissioners.

20 Q. All right. And does it include a set of
21 charts that were a part of the monitoring done for the
22 Arkansas River Compact Commission?

23 A. It does.

24 Q. All right. And is this part of what those of
25 you who worked with the commission are provided to

1 determine whether steps towards the 40 percent
2 reduction goal are being met?

3 A. It is.

4 Q. Okay.

5 MR. BASSETT: Your Honor, I'd move for
6 admission of Joint Defendants' Exhibit 3573.

7 THE COURT: Any objection?

8 MR. NANCE: No objection, Your Honor.

9 THE COURT: 3573 is admitted.

10 Q. (BY MR. BASSETT) Okay. If you would,
11 Mr. Smith, I want to ask you to turn to the second
12 page of that exhibit for the record, Defendants' Joint
13 Exhibit 3573-002. Do you see that?

14 A. I do.

15 Q. All right. And I want you to look at that.
16 At the top, you'll see it says, "Average annual
17 (phosphorus) loading in kilograms per year."

18 A. Yes, sir.

19 Q. All right. Is this chart reporting on
20 monitoring results for some surface waters in the IRW?

21 A. It is. It reflects the computations that
22 were made for the loadings.

23 Q. Okay. And which surface waterbodies were
24 being monitored and reported on on the Arkansas side
25 of the border?

1 A. Well, you'll note that it lists the four
2 stations, the Illinois River station, Baron Fork
3 station, Sager Creek, and Flint Creek.

4 Q. Okay. What do you understand the notations
5 under those stream headings, such as ARK06, to mean?

6 A. Those are designations that DEQ uses to
7 designate their sampling sites.

8 Q. All right. Are these particular locations
9 the locations set up on the Arkansas side as part of
10 the monitoring protocols for the Compact Commission
11 that you were involved in setting up?

12 A. Yes. Those are the sites that were chosen.

13 Q. What years has the Compact Commission
14 received reports from monitoring data that had been
15 gathered?

16 A. Well, since '97, we've provided annual
17 reports back to them.

18 Q. Okay. And the monitoring data is -- is the
19 monitoring data presented as five-year rolling
20 averages?

21 A. It is. A decision was made -- although we do
22 gather the data and do the computations annually, and
23 those results are displayed in other places in the
24 report itself, but one of the concerns that we had as
25 we looked at the -- as we were portraying the data,

1 the question of climatic conditions, how that impacts
2 those things, was brought up.

3 For example, in dry years, you have less
4 movement of water; in wet years, you have much more
5 movement of water. So in order to balance that out to
6 get a little truer measure on it, it was decided that
7 we would compute the annual loads and then do a
8 five-year rolling average to dampen out those climatic
9 concerns to give you a little truer picture perhaps of
10 what was happening in the watershed itself.

11 Q. Okay. Is it your belief, Mr. Smith, based on
12 the data gathered over those time periods, that those
13 stations used for the Compact Commission monitoring
14 program, that the phosphorus loading has decreased in
15 the IRW since the monitoring program began?

16 MR. NANCE: Objection as leading, Your
17 Honor.

18 THE COURT: Sustained. Rephrase.

19 MR. BASSETT: Okay.

20 MR. NANCE: And, Your Honor, it calls
21 for an opinion, and this witness has not been
22 designated to offer any opinion testimony.

23 THE COURT: I'm not sure he's -- is
24 there a dispute that he is a technical consultant to
25 the Arkansas-Oklahoma Compact Commission and tasked

1 with this responsibility of providing the annual
2 reports?

3 MR. NANCE: I don't -- I don't think
4 they've established the foundation for exactly what
5 his role in the annual reporting is, but he has not
6 been identified under Rule 26 as an expert for any
7 purpose.

8 THE COURT: I don't know that this is
9 expert testimony. Mr. Bassett.

10 MR. BASSETT: Your Honor, I'm not asking
11 for expert opinions. He is a member of this technical
12 committee, has been a member of this commission, and
13 has testified about the data that's been collected and
14 produced to the Compact Commission. I'm not asking
15 for an expert opinion.

16 THE COURT: Overruled. But as to the
17 first objection, that is sustained.

18 Before we reask the question, this is a 40
19 percent reduction from what, the baseline '80 to '93?
20 What are you seeking a 40 percent reduction from?

21 THE WITNESS: Well, Your Honor, it's
22 based on that -- I referenced that Tenkiller Clean
23 Lakes study.

24 THE COURT: Yes, sir.

25 THE WITNESS: That document utilized

1 data from the 1980 to 1993 time period. The study
2 itself, if you read it, it goes through and that's the
3 basis that -- that they did their studies and
4 calculations on.

5 Their conclusions were that were we able to
6 reduce phosphorus loading into the Lake Tenkiller by
7 40 percent, that that would stabilize the
8 eutrophication of the lake. It didn't say it was
9 going to clean the lake up, so to say, but a 40
10 percent reduction should stabilize so that the
11 eutrophication of the lake was stable.

12 THE COURT: All right. But as to my
13 specific question, it's a 40 percent reduction from
14 the baseline from '80 to '93?

15 THE WITNESS: Yes, sir. So what we did
16 for each of these sampling stations, we looked at
17 the -- we computed the loading from 1980 to 1993, that
18 gave us a baseline, and then we took 40 percent of
19 that.

20 THE COURT: Gotcha.

21 THE WITNESS: And then on each station,
22 we'd compare that annually to see where we were at
23 that 40 percent number.

24 THE COURT: All right. Mr. Bassett, if
25 you'd rephrase the leading question, please.

1 MR. BASSETT: Okay, Your Honor.

2 Q. (BY MR. BASSETT) Has the --

3 MR. BASSETT: Let me ask it this way, if
4 I can, Your Honor.

5 Q. (BY MR. BASSETT) Let's look at each -- at
6 each station here which is exhibited there on the
7 exhibit.

8 Has the phosphorus loading at Sager Creek
9 gone up between the time monitoring began in 2007?

10 A. Yes, it has.

11 Q. All right. And do you know why?

12 A. That has certainly been a question of
13 discussion because the other three Arkansas stations
14 have shown a decrease over the years that we've
15 monitored that. The only thing that we're aware of
16 that's different on that station is is that Siloam
17 Springs --

18 MR. NANCE: It appears to be
19 speculation.

20 THE COURT: Sustained.

21 MR. NANCE: Let me rephrase.

22 Q. (BY MR. BASSETT) Based on your involvement
23 on the Compact Commission for many years, Mr. Smith,
24 have you had the opportunity to become familiar with
25 the monitoring locations on the Arkansas side of the

1 border?

2 A. I have.

3 Q. Do you know if the Sager Creek monitoring
4 station is near Siloam Springs?

5 A. It is.

6 Q. Do you know whether Siloam Springs has
7 expanded the sewage treatment plant since the time the
8 Compact Commission began gathering its own data in
9 1993?

10 A. Oh, it certainly has.

11 Q. Do you know whether or not Siloam Springs and
12 West Siloam Springs have experienced growth in
13 population in the past 15 to 20 years?

14 A. Yeah. And it parallels the growth that's
15 happened in northwest Arkansas, it certainly has.

16 Q. As of 2007, Mr. Smith, do you know if Siloam
17 Springs had implemented updated phosphorus reduction
18 technology to its plant?

19 A. They have planned to do those -- to update
20 some phosphorus treatment units, but those are not yet
21 online.

22 Q. At the other three locations monitored in
23 Arkansas, had the 40 percent reduction goal set by the
24 Compact Commission been met as of 2007?

25 A. The data that we've computed shows that we

1 are below that 40 percent level.

2 Q. Okay. Thank you. Let me change topics, if I
3 could, for a moment, Mr. Smith. You can put that
4 down.

5 A. All right.

6 Q. Did you have any involvement, Mr. Smith, in
7 the Animal Waste Task Force in Arkansas set up by then
8 Governor Clinton -- or Governor Clinton's
9 administration in the early 1990s?

10 A. I did. I was a technical advisor to that
11 task force.

12 Q. Okay. And did you attend the meetings of the
13 full task force?

14 A. I did.

15 Q. Okay. How often did that task force meet?

16 A. They met every few months, every quarter,
17 something of that, but it was frequent meetings that
18 we had.

19 Q. Did your technical group make presentations
20 or reports to the task force from time to time?

21 A. We did. We reported back on questions that
22 were referred to us. So we presented things like
23 monitoring data to the task force.

24 Q. Okay. How long did the task force continue
25 to operate before completing its work?

1 A. You know, I believe probably a year, year and
2 a half, something like that. It was a lengthy period
3 that we met.

4 Q. And what kind of work was your subgroup
5 doing, Mr. Smith, in connection with your service on
6 the task fours?

7 A. Well, there again, we were answering
8 questions that were referred to us, the technical
9 aspects of the monitoring, and things like monitoring,
10 we were.

11 Q. Prior to the task force being formed, had any
12 Nutrient Management Plans been drafted or did any such
13 plans exist in the state of Arkansas?

14 A. Well, sure. Things like fertilizer
15 recommendations and planning, things like that were
16 being made, yes.

17 Q. Okay. Had some people gotten plans
18 voluntarily?

19 A. They had.

20 Q. In the late '80s and the very early '90s,
21 would these plans have been written as
22 phosphorus-based plans?

23 A. No. Back then the governing parameter was
24 nitrogen by and large.

25 Q. Were any of these old plans at that time in

1 existence in the Illinois River Watershed?

2 A. They were.

3 Q. Okay. Were any of the people who had those
4 plans poultry-growers?

5 A. They were.

6 Q. In the late 1980s and early 1990s, were there
7 any legal requirements in Arkansas for a
8 poultry-grower or anyone else to obtain a
9 nitrogen-based Nutrient Management Plan?

10 A. No.

11 Q. Were those plans then obtained voluntarily?

12 A. They were.

13 Q. Okay. Based on your personal knowledge and
14 personal observations and your work at the agency, did
15 the poultry companies or officials at those companies
16 do anything that you interpreted as discouraging of
17 growers obtaining these plans?

18 A. Not obtaining the plans, no, sir.

19 Q. Were they supportive?

20 A. They were supportive of it.

21 Q. At the time the task force in Arkansas was
22 first assembled in the early 1990s, Mr. Smith, did any
23 agency in either Arkansas or Oklahoma, to your
24 knowledge, have regulatory authority over nonpoint
25 sources?

1 A. Not to my knowledge.

2 Q. Okay. Had either state at that point in time
3 enacted any legislation to attempt to regulate any
4 nonpoint sources prior to the task force being formed?

5 A. Not to my knowledge.

6 Q. As a result of your involvement on the task
7 force, Mr. Smith, was there any change in what the
8 Arkansas Department of Environmental Quality did with
9 regard to nonpoint sources in Arkansas?

10 A. Basically, I think the thrust -- one of the
11 major outcomes of the task force was in our looks at
12 liquid waste. It resulted in our Department of
13 Environmental Quality's adoption of regulation No. 5
14 which does regulate -- or provide the basis for
15 regulation of liquid animal manures. The task force
16 did then look at dry litter and made some
17 recommendations about how the management of dry litter
18 could be made.

19 Q. Why did regulation focus on CAFOs and liquid
20 manure operations at that time?

21 A. Well, that was the -- that was the one area
22 in which regulatory authority existed.

23 Q. Okay. Were poultry farms part of any CAFO
24 regulations in Arkansas at that time?

25 A. Some of the egg-laying operations, those that

1 disposed of their waste in a liquid manner, like
2 laying operations, some of those did fall under those.
3 The dry litter aspects, of course, did not.

4 Q. There were no dry litter regulations at that
5 time, were there?

6 A. There were none, no.

7 Q. All right. Was there anything different that
8 your agency, which was then called the Arkansas Soil
9 and Water Commission, began doing after the task force
10 work was completed?

11 A. Well, we -- at about that same time, we were
12 fortunate in that the federal government did start
13 making funds available through Section 319 of the
14 Clean Water Act, and that's the section of the act
15 that speaks to nonpoint pollution. That gave us a
16 basis of resources that we could utilize to look at
17 nonpoint pollution. So we started at that point doing
18 nonpoint projects.

19 One of our priorities in this watershed was
20 to make Nutrient Management Plans available to
21 farmers. We, for example, contracted with some of the
22 conservation districts in the state so that we could
23 have some technicians to prepare Nutrient Management
24 Plans for growers in that area.

25 Q. And when you say "this watershed," you're

1 talking about the IRW; is that correct, sir?

2 A. Yes, sir. The Illinois River Watershed.

3 Q. All right. Did your agency do anything to
4 help provide resources for getting plans written or
5 for teaching people how to use those plans?

6 A. Yeah. You know, basically -- and this has
7 kind of been the thrust of our program -- we felt we
8 could be most effective if we did kind of a
9 three-pronged approach to that. We felt it was
10 important to do some information, education-type
11 things. We have just found that to be very helpful
12 over different things.

13 We wanted to do some implementation in this
14 arena of confined animal operations. For example, we
15 looked at -- at providing Nutrient Management Plans.
16 In some of the other areas, in the delta part of the
17 state, for example, we were focusing on siltation-type
18 measures to do that.

19 The other approach was to do demonstration
20 projects to look at the effectiveness of best
21 management practices that could be utilized, what sort
22 of best management practices could we best utilize to
23 help improve and abate some of the pollution --
24 nonpoint pollution aspects.

25 Q. Were the educational and informational and

1 implementation programs you developed all still
2 voluntary programs at that time when it came to
3 nonpoint sources?

4 A. Well, certainly there was no authority to do
5 anything but voluntary programs.

6 Q. All right. Did the Arkansas Natural
7 Resources Commission, your agency, elect to regulate
8 dry poultry litter application in the IRW, or
9 elsewhere, in the early 1990s following the completion
10 of the work of the governor's task force?

11 A. Well, following the work of the task force,
12 later on we did view that we wanted to move and to
13 have some regulatory aspect. We didn't have any
14 regulations at that point in time, but we did start to
15 seek to achieve the authority to have those
16 regulations.

17 Q. And what did you do to do that?

18 A. We advocated that the legislature pass
19 legislation that would do that.

20 Q. And was this just for poultry litter or all
21 nonpoint sources?

22 A. No, no. Our program has always been looking
23 at the total aspect of nonpoint pollution. We felt if
24 we were going to really look at the problem, we needed
25 to approach it in all of its elements. So the program

1 has always focused on all of the elements of the
2 things, on agricultural-type things, on urban runoffs,
3 on forested area runoffs, things like county roads,
4 runoff from county roads. All of those things, you
5 know, have some impact on that. So we just felt that
6 what we needed to do was look at the whole suite of
7 nonpoint areas.

8 Q. And over what period of time did that take
9 place, what years?

10 A. Well, from the early '90s on forward
11 really.

12 Q. All right. We'll come back to the
13 legislation in Arkansas in just a minute.

14 Back in the early 1990s, Mr. Smith, as far as
15 you were aware, were voluntary programs, such as you
16 have just described to His Honor, were those programs
17 consistent with what other states were doing at that
18 time?

19 A. I think so.

20 Q. Was the EPA involved in Governor Clinton's
21 task force?

22 A. They attended the meetings.

23 Q. Did the EPA representative on the task force
24 demand or request mandatory regulations at that time?

25 A. No.

1 MR. NANCE: Objection; calls for
2 hearsay.

3 MR. BASSETT: Your Honor -- oh, excuse
4 me. I don't want to interrupt.

5 THE COURT: Any response?

6 MR. BASSETT: Well, Mr. Smith was in the
7 room. I don't know that that's hearsay. He was in
8 the room and was a part of the discussion. Not
9 offered really for the truth of the matter asserted.
10 Just trying to show what -- what took place in that
11 task force, the fact that the EPA had a representative
12 in there, and was not pushing for mandatory
13 regulations seems to be relevant.

14 THE COURT: I believe it is sought for
15 the truth. Sustained.

16 MR. BASSETT: Very well, Your Honor.

17 Q. (BY MR. BASSETT) Did the voluntary program,
18 Mr. Smith, that you have described in Arkansas for
19 poultry litter management predate the regulatory
20 requirements in both Arkansas and Oklahoma?

21 A. Oh, yes, it did.

22 Q. And I think you've already testified that the
23 poultry-growers did participate -- or many of the
24 poultry-growers did participate in the voluntary
25 program?

1 A. They did.

2 Q. Okay. Did the poultry companies, Mr. Smith,
3 or the officials with those companies, based on your
4 observations and knowledge, present any obstacle to
5 your agency in getting growers to participate in the
6 voluntary program?

7 A. No. They encouraged their growers to
8 participate in the voluntary program.

9 Q. Did the poultry companies provide education
10 and information to their growers about the program?

11 A. They did.

12 Q. Okay. Now, you mentioned that aside from
13 education and information, your agency also wanted to
14 do some monitoring to get more data on nonpoint
15 sources in places like the IRW; correct?

16 A. Uh-huh. That's correct.

17 Q. What kinds of monitoring was the Arkansas
18 Soil and Water Commission doing, Mr. Smith, or
19 involved in after the task force work was completed?

20 A. Well, we -- as -- we really did it in two
21 arenas. One was the intensive monitoring that we did
22 at the state line. For example, we've already talked
23 about that.

24 The other part of that was to look to monitor
25 individual best management practices to get a feel for

1 what sort of results we were seeing on an on-farm or
2 on-a-field type of level. We did that not only
3 because it would be quite useful for us to get that
4 knowledge, but part of our EPA projects needs -- or
5 required to contain a certain monitoring element of
6 those also.

7 Q. And who actually performed the monitoring
8 that you just described?

9 A. Basically, we -- we contracted with different
10 individuals to do that monitoring. We didn't -- our
11 staff did not do the monitoring itself, but in this
12 watershed basically the University of Arkansas.

13 Q. Okay. What was your agency's role then in
14 that monitoring?

15 A. We were, of course, looking to acquire the
16 funds to do these projects as well as administration
17 oversight of the projects and then to receive the
18 results, the deliverables that were called for in the
19 contracts.

20 Q. Okay. You've already touched on this, I
21 think, but would you briefly describe what the 319
22 program is?

23 A. Well, 319 is a section of the Clean Water Act
24 that speaks solely to nonpoint pollution. It is the
25 vehicle in the early '90s that Congress started giving

1 some appropriations for that specific purpose. So
2 that's when the states started receiving funding from
3 the federal government that we could dedicate toward
4 nonpoint pollution abatement.

5 Q. Were other projects for education,
6 plan-writing, and things of that nature also part of
7 different 319 cost-shares?

8 A. Oh, certainly.

9 Q. Now, you mentioned that coming out of the
10 task force, that the IRW was identified as one place
11 that your agency wanted to look at to do these kind of
12 programs; is that correct?

13 A. It was one of our priority watersheds, yes.

14 Q. And why is that?

15 A. Well, because it was -- it was
16 certainly -- it has been for years at that time an
17 area of concern. The Supreme Court case focused
18 attention on it. We had had the poultry litter -- the
19 poultry waste task force. The governor's animal task
20 force had focused attention on that. It was the
21 leaders in the watershed were interested in it. We
22 had identified it is an area of concern. We knew
23 through our discussion with the leaders that we felt
24 we could have acceptance, you know, in the voluntary
25 program itself. So it was a natural for us to begin

1 our work with the 3 -- with the nonpoint programs in
2 that area -- on those areas.

3 Q. Was the EPA 319 grant program something that
4 your agency used, Mr. Smith, to either get grants or
5 set up cost-share programs for projects to benefit the
6 waters in the IRW during the 1990s?

7 A. It was a vehicle that we could get federal
8 resources to couple with our state resources to do
9 some of these nonpoint projects.

10 Q. Were there any other federal grant programs
11 used by Arkansas in the IRW to help -- to try to help
12 improve water quality?

13 A. Well, we've always tried to piggy-back on
14 whatever programs and resources are available to do
15 that. Interestingly, the work on designation of these
16 things as priority areas led them to be priorities for
17 other USDA programs, such as EQUIP, for example. It
18 made it a little easier to acquire some other
19 resources for nonpoint programs.

20 Q. What's EQUIP?

21 A. That's the USDA environmental quality
22 incentive program.

23 Q. Okay. Was there a time, Mr. Smith, when you
24 and your agency, the Arkansas Natural Resources
25 Commission, decided to regulate dry animal manure

1 rather than issues, recommended practices, and grant
2 programs?

3 A. Well, it has been our judgment for a long
4 time that we needed to move into that arena, but we
5 did start advocating early on that we needed -- that
6 the state needed to adopt some regulations.

7 Q. And about what time period would that have
8 been?

9 A. In the early -- in the early 2000s.

10 Q. Okay. Is it your understanding, Mr. Smith,
11 that the statutes that were passed by the Arkansas
12 Legislature established the policy objectives for the
13 state?

14 A. They did.

15 Q. Do they lay out the framework for how litter
16 use, among other things, should be managed in
17 Arkansas?

18 A. It did. The legislation in 2003, for
19 example, designated what was called surplus nutrient
20 areas. Those were areas in which we could -- that
21 regulations would apply.

22 The other pieces of the legislation, for
23 example, required that -- legislation requires that in
24 those nutrient surplus areas, that anyone that spreads
25 nutrients on the land, that they do it in accordance

1 with a Nutrient Management Plan. It also requires
2 certification of the people that draw up those
3 Nutrient Management Plans as well as the people -- and
4 requires a certification for people that spread the
5 nutrients on the land.

6 And here again, I'd point out that we're not
7 talking about just dry poultry litter; this is any
8 nutrients. This is commercial fertilizer. It could
9 be compost. It's any form of nutrients that's spread
10 on the land, you're required to do that in accordance
11 with a Nutrient Management Plan.

12 Q. And what year did the Arkansas Legislature
13 pass those statutes?

14 A. 2003.

15 Q. All right. Was there an acreage criteria in
16 the statutes?

17 A. The statute says that anything above two and
18 a half acres is where the Nutrient Management Plans
19 are required.

20 Q. And do you know why there was an acreage
21 criteria in the statutes?

22 A. Well, the judgment was made if you go below
23 that, then you're looking at such things as individual
24 city lots, individual residential lots on there,
25 to -- it was just the judgment that to prepare a

1 unique Nutrient Management Plan for that small an
2 area, for that many different lots was just not
3 feasible.

4 Q. Okay. Following the passage of the
5 legislation, Mr. Smith, in 2003, were there also
6 regulations that were subsequently enacted to fill in
7 the details?

8 A. Well, certainly anytime that enabling
9 legislation is passed, then the responsible agency
10 then prepares rules and regulations to detail how
11 you're going to administer that authority that's given
12 to you. So we did, after the passage of that, start
13 drafting our rules and regulations.

14 Q. And was that the work done by your agency?

15 A. It was.

16 Q. All right. And when were those regulations
17 enacted?

18 A. 2005.

19 Q. All right. And were you involved in setting
20 up those regulations, working on those regulations?

21 A. I was a part of the team that worked on that,
22 yes.

23 Q. Okay. And did your agency retain anybody or
24 any institution to help draft and prepare those
25 regulations?

1 A. Yeah. With the details that we had to have
2 with -- for example, in the preparation of Nutrient
3 Management Plans, we had to develop phosphorus
4 indices. For example, a decision was made to base
5 those plans on the phosphorus index. That had to be
6 developed.

7 At the same time, we felt that rather than
8 wait until the growers -- focus on growers, the people
9 receive the plans, rather than just continue to let
10 them utilize and spread the -- spread the nutrients
11 that they had in the past, we needed -- it would be
12 well to have a protective rate to give people the
13 options of either spreading the nutrients with their
14 Nutrient Management Plan that they had or to do a
15 protective rate.

16 So we contracted with the University of
17 Arkansas to do both of those things, to give us a
18 phosphorus index to be able to draft the plans
19 themselves, and to provide a protective rate that
20 people could utilize while they were waiting for their
21 plans to be developed.

22 The idea there was you do two things. You
23 give a measure of protection that wouldn't exist if
24 they waited until the plans are developed, and it gave
25 the individuals something to quantify that they could

1 utilize while their plans were being developed.

2 Q. Okay. What specific U of A scientists were
3 involved in developing the phosphorus index that was
4 incorporated into the Arkansas regulations?

5 A. At that time, I believe it would have been
6 Phillip Moore and Tommy Daniels. Those two professors
7 are what comes to my mind.

8 Q. All right. Now, Mr. Smith, I know you're not
9 a soil scientist -- you are not a soil scientist, are
10 you?

11 A. I am not, no. No, sir.

12 Q. Okay. But despite the fact that you're not a
13 soil scientist, can you give us just generally your
14 understanding of what a phosphorus index is and how it
15 works generally?

16 MR. NANCE: Lack of foundation, Your
17 Honor.

18 THE COURT: Sustained.

19 Q. (BY MR. BASSETT) You have been with the
20 Arkansas Natural Resources Commission since 1985;
21 correct?

22 A. I have, sir.

23 Q. And you worked, along with others in your
24 agency, to develop these regulations; correct?

25 A. I did.

1 MR. BASSETT: Your Honor, I'm not asking
2 for an expert opinion. I'm just asking for a general
3 layman's opinion -- his layman's understanding, just
4 very general, of what the phosphorus index is.

5 THE COURT: I think that's fine.
6 Frankly, it would be helpful to me because I don't
7 know that I've had a sufficient explanation.

8 MR. BASSETT: And that was the only
9 reason for doing it. I'm not trying to make a man
10 into a scientist who isn't a scientist, but I think a
11 general overview would be helpful to the court.
12 That's the only reason.

13 MR. NANCE: You've telegraphed what you
14 wanted, Your Honor, but I want to go down swinging on
15 this and say they still have not established that he
16 knows anything about a phosphorus index. He may have
17 helped with the rules and the regs, but he's not a
18 soil scientist and he's not with U of A and there's no
19 foundation that he knows anything about how the
20 phosphorus index was developed or what it does.

21 THE COURT: Well, I've got a get a fix
22 on it, I haven't really been given anything to get me
23 there, so overruled. This may not be the definitive
24 explanation, but at least I'm not comfortable with
25 what the phosphorus index is.

1 So go ahead?

2 Q. (BY MR. BASSETT) Let me just repeat the
3 question for you, Mr. Smith.

4 Can you give us -- give the judge your
5 understanding generally of what a phosphorus index is
6 and how it works?

7 A. Basically, the index is a risk-based
8 calculation on being able to reduce the risk of runoff
9 from a -- from a farm, for example, for whatever
10 you're drawing up a Nutrient Management Plan for. We
11 think it's more flexible and more useful --

12 MR. NANCE: Your Honor, this is opinion
13 testimony, and he's definitely not an expert on its
14 usefulness or its flexibility.

15 THE COURT: This is basically Arkansas
16 policy. I'll take it as that. Overruled.

17 Q. (BY MR. BASSETT) You may continue.

18 A. It allows you to look at -- at a suite of
19 things in developing a Nutrient Management Plan. You
20 start with the soil test phosphorus, you look at the
21 uniqueness of the individual's land, you look at his
22 soil types, you look at the topography of the land,
23 you look at the slopes of the land, you look at best
24 management practices that he might want to incorporate
25 in his plan -- or has incorporated in his plan. And

1 looking at that whole suite of things, then you can
2 take those and compute a Nutrient Management Plan from
3 those. But it allows you looks at all of those areas,
4 and we think that's the strength of the -- of the
5 phosphorus index procedures.

6 Q. And is each field looked at individually and
7 uniquely?

8 A. Oh, certainly. It's -- it -- with
9 the -- with the complicated things that you look at
10 from that, it simply is not -- you're not able to do a
11 cookie-cutter approach. You have to look at the
12 uniqueness of each farm in itself. So it
13 takes -- that's why, for example, that we wanted the
14 people that draw those plans up to be certified.
15 There -- you got to bring some expertise to that.

16 Q. Is each field scored using the index?

17 A. It is.

18 Q. Okay. And then is a recommendation made
19 regarding nutrient use on that field taking all those
20 factors into consideration?

21 A. Yes, sir, it is.

22 Q. Okay. Do you know if Arkansas, Mr. Smith, is
23 the only state that manages litter
24 applications through the phosphorus index?

25 A. Oh, no. There are many, many states that

1 utilize the phosphorus index.

2 Q. Do you know how many states use the
3 phosphorus index?

4 MR. NANCE: Your Honor, I don't believe
5 this is relevant to any consideration before this
6 court.

7 THE COURT: Overruled.

8 Q. (BY MR. BASSETT) Do you know how many states
9 use the phosphorus index, Mr. Smith?

10 A. The number's up into the 40s. I've heard as
11 high as 48 of the states utilize the phosphorus index.

12 Q. All right. Now --

13 MR. BASSETT: Just one moment, Your
14 Honor.

15 THE COURT: Yes, sir.

16 MR. BASSETT: I'm not as organized as
17 the rest of these good lawyers are here.

18 Q. (BY MR. BASSETT) Mr. Smith, the court has
19 been very patient for a number of months now and has
20 heard about something called the NRCS Code 590 from
21 the USDA.

22 Do you know what the NRCS is and what Code
23 590 is?

24 A. Well, NRCS is the Natural Resources
25 Conservation Service, an agency of the USDA.

1 Q. Do you know what the NRCS recommendations are
2 to state agencies, such as yours in Arkansas, as far
3 as guidance to states on how they can manage nutrient
4 application?

5 A. As with most bureaucracies, guidance
6 documents are prepared and sent down so that
7 each -- that there will be some uniformity in the way
8 the programs are carried out across the states, and
9 590 is one of those guidance documents that NRCS has
10 prepared.

11 Q. Does the NRCS recognize different approaches
12 to managing nutrient applications?

13 A. Yeah. They basically look at -- my
14 recollection is that there are three areas in which
15 they recognize the development of Nutrient Management
16 Plans. One is the soil test phosphorus, one is the
17 phosphorus index, and one is a phosphorus threshold.
18 Each of those options are available through their
19 documents in the preparation of Nutrient Management
20 Plans.

21 Q. Just so for the record, is a phosphorus index
22 one of the legitimate approaches or options a state
23 can elect to use under NRCS recommendations?

24 A. It is.

25 Q. Okay. Do you know what approach the State of

1 Oklahoma has elected to use for managing nutrient
2 applications in the IRW?

3 A. Oh, I understand they're utilizing soil test
4 phosphorus.

5 Q. And would it be fair to say that's also an
6 approach or an option that fits within the NRCS
7 options given to the states?

8 A. Certainly it's one of the three options
9 that's available to any state.

10 Q. Does the NRCS assist in writing any of the
11 Arkansas Nutrient Management Plans?

12 A. They do. The -- I mentioned the technicians
13 that we contract with the conservation districts.
14 They are housed in the USDA field offices and NRCS
15 field offices.

16 Q. Do you think those NRCS plan writers could
17 write plans for Arkansas if Arkansas was using it as a
18 basis for those plans some methodology that was not
19 authorized as an option?

20 A. No, they could not.

21 Q. Do you know whether the NRCS recommends
22 anything with regard to the role of the primary land
23 grant university in each state?

24 A. Yes. They depend on the land grant
25 institutions to make recommendations for nutrient

1 management planning.

2 Q. And the primary land grant university in the
3 state of Arkansas is what?

4 A. The University of Arkansas at Fayetteville.

5 Q. Okay. Go Hogs. We finally found a
6 field-goal kicker on a team that's worse than ours.

7 THE COURT: And you won in overtime.

8 MR. BASSETT: Yes, we did. Mr. Graves
9 went to the game. He's still thawing out, I think,
10 Your Honor. But anyway, that's an aside. We're just
11 happy to win a game -- a bowl game for a change.

12 THE COURT: I see Mr. Green is missing.
13 He must be lamenting the Skins' loss yesterday. I
14 understand the coach is about to lose his job too.

15 Go ahead, Mr. Bassett.

16 MR. BASSETT: Thank you, Judge. Sorry
17 for the interruption there. A little humor never
18 hurts.

19 THE COURT: No, sir.

20 MR. BASSETT: Particularly when you have
21 a field-goal kicker like ours who's struggled all
22 year.

23 Q. (BY MR. BASSETT) Okay. Mr. Smith, did your
24 agency in developing the Arkansas phosphorus index
25 look to the primary land grant university in Arkansas

1 to assist you in selecting the use of a phosphorus
2 index for regulating nonpoint-source phosphorus in
3 Arkansas?

4 A. We did.

5 Q. Okay. Has Arkansas adopted, Mr. Smith, Code
6 590 specific to Arkansas?

7 A. Well, it's -- it's certainly the guidance
8 that we have utilized in the development of the
9 phosphorus index.

10 Q. Okay. If you would just look in your folder
11 up there, the very last folder -- actually it says
12 "Tyson" -- here, let me just show it to you.

13 MR. BASSETT: May I approach, Your
14 Honor?

15 THE COURT: You may, sir.

16 THE WITNESS: Thank you.

17 Q. (BY MR. BASSETT) Do you have that in front
18 of you?

19 A. Yes, sir, I do.

20 Q. Okay. Do you recognize that as Code 590
21 that's been adopted by Arkansas?

22 A. Yes, it is.

23 MR. BASSETT: Your Honor, at this point,
24 we would like to ask the court to take judicial
25 notice, and I think there is a copy of that in your

1 packet, but obviously it's not appropriate to enter it
2 as an exhibit. We would just simply like the court to
3 take judicial notice of Code 590 as adopted by the
4 State of Arkansas.

5 Your Honor, it would be the last one. I
6 think it was Tyson Demonstrative 315.1. I've got a
7 copy up here if you'd like another copy that doesn't
8 have any exhibit mark on it or demonstrative marking.

9 MR. NANCE: Your Honor, I object to
10 offering this for judicial notice. It was listed as a
11 demonstrative, it's not listed as an exhibit, and it's
12 a complete surprise that they would want you to take
13 judicial notice of it at this point.

14 MR. BASSETT: Well, Your Honor --

15 MR. NANCE: It's not adopted by the
16 State of Arkansas. It's handed down by the NRCS.

17 THE COURT: Mr. Bassett.

18 MR. BASSETT: Your Honor, the witness
19 has testified that this has been -- that this
20 is -- that this Code 590 has been adopted by the State
21 of Arkansas. All we're asking the court to do is to
22 take judicial notice. We're not trying to enter this
23 into evidence.

24 THE COURT: Well, his argument is that
25 it's a surprise that you're asking the court to take

1 judicial notice of this. Your response?

2 MR. BASSETT: Well, I guess certainly
3 we're not intending to surprise anybody and I don't
4 know really that this would -- could be a surprise.
5 The court did take judicial notice of Oklahoma Code
6 590. All we're trying to do is --

7 THE COURT: Of course, the Oklahoma
8 statute incorporates Code 590 in terms of -- and I'd
9 have to go back and find the specific reference. I
10 think it incorporates 590 in its entirety, not simply
11 the STP aspects, doesn't it, Mr. Nance?

12 MR. NANCE: That's correct, Your Honor.
13 And Oklahoma Code 590 was listed as an exhibit by both
14 sides. There was no surprise. Everybody knew that it
15 was going to come in.

16 THE COURT: But only the STP side of it?

17 MR. NANCE: I think the whole document's
18 in. I don't remember the exhibit number.

19 THE COURT: All right. But refresh my
20 recollection. That's the Oklahoma Code 590?

21 MR. NANCE: Correct.

22 THE COURT: All right. Mr. Bassett.

23 MR. BASSETT: Well, again, Your Honor,
24 we're not trying to surprise anybody. We thought this
25 would be helpful to the court.

1 THE COURT: Right.

2 MR. BASSETT: Since these are
3 various -- they are various options that are given to
4 the states under NRCS, and we thought since the court
5 had the benefit of Oklahoma Code 590, that it would be
6 helpful to have the counterpart for Arkansas.

7 THE COURT: No. Is this actually
8 promulgated in the Code of Federal Regulations?

9 MR. BASSETT: No, I don't believe it is,
10 Your Honor. Arkansas --

11 *(Discussion held off the record)*

12 MR. BASSETT: Arkansas' ARC office has
13 adopted it.

14 THE COURT: Well, unless this is set
15 forth in the pretrial order as a document -- or as an
16 exhibit and unless it's in the form of some sort of
17 document that I can take judicial notice of --
18 certainly I can take judicial notice of a statute or
19 reg -- I don't know that I can take notice of
20 Arkansas' Code 590, can I?

21 MR. BASSETT: Well, I thought you could,
22 but I may be wrong.

23 THE COURT: No.

24 MR. BASSETT: I think unless one of
25 these smart guys over here can come whisper in one of

1 these big ears and help me right now, Your Honor, I
2 don't have many more bullets to fire on this in an
3 effort to try to get the court to take judicial
4 notice.

5 THE COURT: Well, without anything more,
6 the objection's sustained. Go ahead.

7 MR. BASSETT: Thank you, Your Honor.

8 Q. (BY MR. BASSETT) Mr. Smith, what is your
9 understanding generally of what the Arkansas
10 regulations require a poultry-grower or user of
11 commercial fertilizer in the IRW to do?

12 MR. NANCE: Your Honor, I object for
13 lack of foundation. He has not testified that he's
14 familiar with the regulations or that his job with the
15 ANRC in with the water management division, or
16 whatever it is, has anything to do with those
17 regulations.

18 THE COURT: Well, I think he's touched
19 on it, but we'll see if we can lay a more firm
20 foundation. Sustained.

21 MR. BASSETT: Yes, sir. Thank you,
22 Judge.

23 Q. (BY MR. BASSETT) Mr. Smith, are you familiar
24 with the Arkansas regulations with respect to what's
25 required from poultry-growers or users of commercial

1 fertilizer?

2 A. Yes, sir.

3 Q. And do you work with that in your office day
4 in and day out?

5 A. Yes, sir.

6 Q. All right. And you help put together these
7 regulations; is that true?

8 A. There again, I was part of the team that
9 worked on that.

10 Q. And you are familiar with those regulations?

11 A. Yes, sir.

12 Q. And do you know what those regulations
13 require a poultry-grower to do?

14 A. Within any of the surplus nutrient areas, a
15 poultry-grower is required to obtain a Nutrient
16 Management Plan in order to apply nutrients to the
17 soil, to the land.

18 Q. Okay. Does the plan have to be written by a
19 certified nutrient management specialist?

20 A. They do.

21 Q. Okay. And does the site have to be evaluated
22 using the criteria in the Arkansas phosphorus index?

23 A. That's certainly part of the development of a
24 Nutrient Management Plan.

25 Q. Were these regulations, Mr. Smith, set up

1 because you and your agency concluded that poultry
2 litter was, in fact, polluting the IRW or that there
3 was too much of it in the IRW?

4 A. It was a factor in there, but there again, we
5 looked at the whole suite of nonpoint. That's the
6 reason, for example, that the regulations speak to
7 commercial fertilizers and not just to poultry litter.
8 It speaks to the whole suite of nutrient management
9 and to whatever nutrients are applied in those surplus
10 nutrient areas.

11 Q. Had your agency, Mr. Smith, received any kind
12 of charge to fulfill in terms of addressing potential
13 sources of problems that might challenge natural
14 resources?

15 A. Well, certainly we -- we have.

16 Q. And were these regulations a part of the
17 response to that?

18 A. Yeah. That -- yes. The whole -- basically
19 from two parts. One from our responsibilities with
20 the 319 program itself, as with the legislation that
21 was passed in the state.

22 Q. Okay. Let me ask you this because I'm sure
23 there will be those who will be interested in it.

24 Why were the regulations that were adopted by
25 the ANRC rolled out over a period of time following

1 the passage of the statutes in 2003?

2 A. Well, first of all, it was -- it was not an
3 easy piece of legislation to pass. There were
4 certain -- there were certainly some opposition to the
5 passage of the law itself so there had to be some
6 gathering of people to support the legislation itself.

7 Once legislation's passed and we spoke to the
8 need, for example, to develop protective rates and to
9 develop a poultry index, that needed to be within the
10 rules and regulations themselves so that comments
11 could be made to that.

12 Our Administrative Procedures Act in the
13 State of Arkansas then requires us to go forward and
14 hold public hearings. We went through a series of
15 public hearings, received comments back from that.

16 It is a controversial piece of legislation.
17 There were, for example, some property rights groups
18 that were opposed to the enactment of those rules and
19 regulations. So we had one series of public hearings,
20 received a huge amount of comments back from that,
21 went through another realm of doing some modification
22 to our rules and regulations, and went out to another
23 series of public hearings on there. So it took
24 a -- that span of time in order to develop those rules
25 and regulations.

1 Q. Did the property rights people that came to
2 these public hearings express quite vocally their
3 opposition?

4 A. They were not shy about speaking their
5 opposition to it.

6 Q. All right. Was there any consideration also
7 in terms of the roll-out over time as to the need to
8 give the University of Arkansas scientists time to
9 develop the phosphorus index?

10 A. Well, that was certainly part of it because
11 they, as well as us, wanted sufficient time to make
12 sure that the proper looks of science was put into the
13 development of that phosphorus index.

14 Q. Was there any consideration also as to the
15 time that would be needed after the development of the
16 phosphorus index for farmers and others to obtain a
17 plan based on it?

18 A. Yeah. Certainly that was a consideration.
19 As a matter of fact, the legislation specifically
20 speaks that the commission could allow some time to do
21 that. It was our judgment that we needed to allow
22 some time just because of the number of poultry -- of
23 Nutrient Management Plans that had to be developed.

24 So that's why the rules and regulations allow
25 the use of the protective rate, for example, until

1 such time as the plans could be developed.

2 Q. All right. This may have already been
3 covered --

4 MR. BASSETT: And, Your Honor, I
5 apologize if this is repetitious. But I want to ask
6 Mr. Smith --

7 Q. (BY MR. BASSETT) Or, Mr. Smith, I want to
8 ask you -- of course there's been some discussion
9 about the Arkansas litter laws having a protective
10 rate -- but do you know anything about this protective
11 rate? Obviously you do because you've already talked
12 about it, but do you know something about the
13 protective rate? Do you know what it is?

14 A. Well, certainly it was -- it was an option
15 that we wanted to put in place to give until such time
16 as plans develop.

17 Q. Who determined the protective rate?

18 A. We worked with the University of Arkansas in
19 developing that protective rate.

20 Q. All right.

21 A. The numbers for the protective rate.

22 Q. And was the protective rate intended to be
23 something used on an interim basis only?

24 A. Yes. It could only be used until 2007. So
25 there's a specific time frame span in which that

1 protective rate could be utilized.

2 Q. Was the protective rate more or less
3 restrictive than what had previously been allowed or
4 than what was then allowed under a Nutrient Management
5 Plan?

6 A. Well, until the time the legislation was
7 adopted, there was -- there was no restriction at all
8 on there other than voluntary-type measures. In
9 general, I think the protective rate is probably more
10 restrictive than the phosphorus index would be because
11 it does not -- it doesn't take into account the other
12 things that a phosphorus index can look at.

13 Q. The factors you talked about earlier?

14 A. Yes, sir.

15 Q. Can farmers or others still use a protective
16 rate for litter applications?

17 A. No, sir. That option expired in 2007.

18 Q. Not to quibble here, but did it actually
19 expire on December 31st, 2006?

20 A. Yes, sir. That's true.

21 Q. All right. Now, the Arkansas regulations
22 have recently been revised, have they not?

23 A. Yes, sir. Just within the last few days.

24 Q. Do the revised regulations allow poultry
25 litter to be applied at a protective rate?

1 A. No, they do not.

2 Q. All right. To your knowledge, did Arkansas
3 seek input or comments from Oklahoma related to its
4 poultry litter regulatory statutes or regulations?

5 A. Well, we had the -- since we meet via the
6 Compact, we meet with Oklahoma annually on there, and
7 our commissioners at that time, this period of time
8 that you're speaking of, we would report annually to
9 the Compact progress toward our -- we spoke about the
10 legislation that was being passed, we spoke about the
11 development of our rules and regulations, and reported
12 to the Compact itself. That encompassed, of course,
13 those Oklahoma individuals that were sitting on the
14 Compact.

15 Q. Okay. And I don't want to be confusing about
16 the dates. I'm really referencing now prior to the
17 laws that were passed in 2003.

18 Do you know if copies, draft statutes, were
19 provided to Oklahoma officials before the legislation
20 was passed in 2003 in Arkansas?

21 A. I'm not sure. I suspect they were but I'm
22 not sure.

23 Q. Okay. So do you know if draft copies were
24 provided to any Oklahoma officials?

25 A. I couldn't tell you for sure.

1 Q. All right. To your knowledge, did any
2 Oklahoma official identify any particular aspects of
3 the proposed statutes or regulations in Arkansas that
4 they found objectionable or unreasonable?

5 A. No, sir. I don't recall any.

6 Q. You testified that you have participated in
7 meetings in which Oklahoma officials were there also;
8 is that correct?

9 A. Yes, sir.

10 Q. Okay. In leading up to the passage of the
11 laws in Arkansas in 2003, Mr. Smith, did you ever
12 participate in or witness anything that you believe
13 would have constituted intimidation of Oklahoma
14 officials that would have made them nervous about
15 providing comment on the Arkansas regulations?

16 A. No, sir.

17 Q. Okay. Did you ever try to intimidate an
18 Oklahoma official?

19 A. I don't think a minor official can intimidate
20 an Oklahoma official.

21 Q. You don't strike me as the intimidating sort
22 either.

23 But did you ever witness anybody else, any
24 other official, or anybody else at all, from Arkansas
25 that tried to do that?

1 A. No, sir.

2 MR. BASSETT: Your Honor, if I might
3 have a moment here, there's a couple of questions I
4 had that I think Mr. Smith's already covered and I
5 don't want to be repetitious.

6 THE COURT: Yes, sir.

7 Q. (BY MR. BASSETT) Mr. Smith, are you aware
8 that -- and I'm sure you are since you're sitting in
9 this courtroom -- aware that several poultry companies
10 are being sued in this case by the State of
11 Oklahoma?

12 A. I am.

13 Q. Those companies are represented by these
14 lawyers over here. Let me just name them for you very
15 briefly. Tyson Foods, Cobb-Vantress, Cargill,
16 Simmons, Peterson, George's, and Cal-Maine. I think
17 that's the lineup.

18 Is it your recollection that any of these
19 poultry companies, or any officials connected to these
20 poultry companies, were opposed to the regulations or
21 somehow held up the process of developing and passing
22 regulations back during the 2003, 2004, 2005 time
23 period?

24 A. No. They were supportive of the legislation
25 and the rules and regulations.

1 Q. Was there any resistance from any of the
2 poultry-growers to those regulations?

3 A. Well, yes, there were, and that was evidenced
4 in our public hearings. There were -- you know,
5 certain individuals just felt that the government was
6 straying into areas they didn't need to be moving
7 into.

8 Q. All right. Mr. Smith, do you know anything
9 about an agreement between Arkansas and Oklahoma
10 called the Joint Statement of Principles from 2003?

11 A. Yes, sir, I do.

12 Q. Were you involved in any discussions
13 surrounding the entry into that agreement?

14 A. Yes. I participated and I was at the
15 meetings in which those discussions with Arkansas and
16 Oklahoma took place.

17 Q. And what was the purpose of that agreement,
18 Mr. Smith, as you understood it?

19 A. Well, it was -- when we were made aware that
20 Oklahoma intended to adopt those rules and
21 regulations, it was the consensus of the Arkansas
22 agencies that that was a standard that was just not
23 achievable.

24 Q. Now, let me stop you there for just a second.
25 When you're talking about those regulations,

1 are you talking about the numeric criteria for
2 phosphorus in the scenic rivers in the IRW?

3 A. Yeah. The .037.

4 Q. Thank you. Now you may continue.

5 A. Yeah. In lieu of that, I guess the choices
6 there was to either file suit, to do that, or enter
7 into an agreement with Oklahoma regarding that, which
8 we did. That document, for example, set forth some
9 criteria that Arkansas would agree to do. It looked
10 at -- for example, it mentions that the standard would
11 be adopted by 2012 and sets forth some agreements
12 between the two states.

13 Q. What is your understanding of what Arkansas
14 agreed to do in this agreement?

15 A. Basically, we -- we agreed to look at
16 reducing our point sources to one part per million and
17 to go forward with looking at reducing nonpoint
18 pollution abatement by doing things like the Nutrient
19 Management Plans.

20 Q. Okay. So were the Arkansas litter management
21 statutes also a part of this agreement?

22 A. Well, that became a part of it.

23 Q. Okay. To the best of your knowledge,
24 Mr. Smith, has Arkansas fulfilled its duties under
25 this agreement?

1 A. We really feel that we've -- that we've not
2 only met the spirit of the agreement, but gone beyond
3 it. A lot of our point sources are able to achieve
4 below the one part. We felt that we have really been
5 able to bring some resources to bear and have achieved
6 a lot in the nonpoint arena.

7 Q. Has Arkansas done anything beyond what was
8 discussed or required under this 2000 agreement to try
9 to reduce phosphorus loads to streams and rivers in
10 the IRW?

11 A. I think so.

12 Q. Tell us what.

13 A. Well, by bringing the point sources down
14 below the one part, for example, with enacting the
15 legislation that requires the Nutrient Management
16 Plans and the certifications that we talked about, by
17 not only addressing those type of things, but looking
18 and putting resources in to do urban nonpoint
19 projects, to look at adoption of best management
20 practices in the arena of timber harvesting and things
21 like that.

22 Q. And how about CREP grants?

23 A. Well, one other -- we were extremely happy
24 to -- that we were successful in getting the CREP
25 grant for the Illinois River Watershed, which will

1 allow us to utilize \$24 million of federal resources
2 to cost-share in best management practices on the
3 Arkansas side of the Illinois River.

4 Q. And the \$30 million in grants, some of that
5 was 319 federal money; is that right?

6 A. Well, it is -- it's really not 319 money;
7 it's a separate category.

8 Q. Okay. I apologize.

9 A. It's -- it's through -- FSA and NRCS are the
10 two federal agencies, but it's a separate pot of
11 money, it's not an EPA pot of money, but it
12 does -- it's a total of \$30 million. Of that \$30
13 million, there's \$6 million dollar nonfederal
14 cost-share, if you will. The purpose of that is to
15 give some extra incentives to allow individuals to put
16 best management practices in place on their land.

17 Q. Okay. And was there some money -- match
18 money contributed from northwest Arkansas
19 industries?

20 A. It was really -- in order to garner that
21 nonfederal option, state agencies in Arkansas, for
22 example, are able to contribute some in-kind
23 contributions toward that. The general assembly
24 designated some money to be utilized for that. The
25 poultry industry contributed some money. I believe

1 the Walton Family Foundation contributed some money
2 also. So it was a widespread effort, if you will, to
3 garner that \$6 million so that we could capture that
4 \$24 million in federal funding.

5 Q. All right. Let me ask you this, Mr. Smith.
6 You touched on this already.

7 When did the -- officially on what date did
8 the revisions to the Arkansas phosphorus index go into
9 effect?

10 A. Just a few days ago, the first of the year.

11 Q. January 1st, 2010?

12 A. 2010, Yes, sir.

13 Q. Or 2010, whatever we're supposed to say.
14 That would have been last Friday; correct?

15 A. Yes, sir.

16 Q. Do you have any understanding of what the
17 revisions to the regulations do?

18 A. Well, they look at -- they allow us to get
19 into the newest scientific work that the university
20 has done and allow us to capture those type things, to
21 revise our index to the state-of-the-art, if you will,
22 as far as the science is going today.

23 Q. And did the scientists at the University of
24 Arkansas work on this revision to the
25 phosphorus -- Arkansas phosphorus index?

1 A. They did.

2 Q. Now, you're not personally involved in the
3 specifics of the science part of those regulations,
4 are you?

5 A. As you pointed out, I'm not a soil scientist,
6 so no.

7 MR. BASSETT: Your Honor, just one
8 moment here.

9 THE COURT: Just a few questions here,
10 Mr. Bassett, while you're looking.

11 These new revisions, do you have any
12 understanding whether they tighten up or loosen the P
13 index?

14 THE WITNESS: It's really site-specific,
15 Your Honor. It depends on the individual and the
16 individual characteristic of each farm itself. There
17 are going to be farms in which those regulations are
18 tightened up, where they're not going to be able to
19 use as much.

20 Conversely, there could be some areas,
21 depending on the circumstances, where, you know, more
22 fertilizers, for example, could be applied. But it's
23 a very unique thing --

24 THE COURT: The revisions went to what
25 aspects of the P index, soil type? Because you

1 described it as a complex amalgam of factors. What
2 were the revisions focused on?

3 THE WITNESS: Well, it was really to
4 look at the research that the University of Arkansas
5 had done through those soil scientists to incorporate
6 those revisions into place there.

7 THE COURT: Whatever those may be?

8 THE WITNESS: Whatever they may be. And
9 I can't give you the -- you know, the exact details
10 that have since that --

11 THE COURT: All right. You agreed in
12 your Joint Statement of Principles to, you say, look
13 at reducing point sources to one part per million;
14 correct?

15 THE WITNESS: Yes, sir.

16 THE COURT: All right. Is Siloam
17 Springs there?

18 THE WITNESS: They have not brought
19 their treatment plant online yet. It's the one plant
20 that has not yet constructed their treatment
21 facilities.

22 THE COURT: All right. So no treatment
23 facilities there whatsoever?

24 THE WITNESS: Oh, yes, sir. There are
25 treatment facilities that --

1 THE COURT: Right, right. It was the
2 upgrade you were talking about?

3 THE WITNESS: I'm talking about the
4 specific phosphorus removal units.

5 THE COURT: All right. Now, that
6 particular tributary dumps into Flint Creek which
7 ultimately dumps into the Illinois; correct.

8 THE WITNESS: I believe Sager Creek
9 is --

10 THE COURT: No. That's what I'm saying.
11 Sager dumps into Flint; correct?

12 THE WITNESS: I believe that's correct,
13 Your Honor. I'm not sure but --

14 THE COURT: All right. I'm seeing our
15 Secretary of the Environment, he's saying yes.

16 All right. When are those improvements
17 supposed to go online?

18 THE WITNESS: They're scheduled to go
19 online this year.

20 THE COURT: You testified that in any of
21 the surplus nutrient areas poultry-growers are
22 required to obtain a Nutrient Management Plan. Are
23 you aware of what percentage of the Arkansas portion
24 of the IRW is designated a surplus nutrient area?

25 THE WITNESS: Well, the entire Illinois

1 River Watershed is designated as a surplus
2 nutrient --

3 THE COURT: All right. I just wanted
4 that to be clear.

5 Go ahead, Mr. Bassett.

6 MR. BASSETT: Judge, at this point, we
7 would like -- the defendants would like to ask the
8 court to take judicial notice of the new rules
9 governing the Arkansas soil nutrient and poultry
10 litter application and management program that went
11 into effect on January 1, 2010. This is the new
12 revised Arkansas phosphorus index. These are the
13 regulations which -- which, as I said, are now in
14 effect.

15 I have -- I think, Mr. Nance, you've got a
16 copy of this, do you not?

17 MR. NANCE: I do.

18 MR. BASSETT: Let me just show you what
19 I have here. Have you got this?

20 *(Discussion held off the record)*

21 MR. BASSETT: Your Honor, let me do this
22 one at a time.

23 First of all, I'd like the court to take
24 judicial notice of the new rules which went into
25 effect January 1st, 2010. I think there is a copy in

1 the court's packet. Yeah, it's actually -- I think we
2 actually had identified it as Defendants' Joint
3 Exhibit 8133. I have a clean copy here, Your Honor,
4 that has no exhibit number on it. It's however the
5 court would prefer to do it.

6 THE COURT: Well, I have a copy here.
7 It doesn't matter that it has an exhibit sticker on
8 it.

9 Any objection to such judicial notice --

10 MR. NANCE: Your Honor, I don't object
11 to the court taking judicial notice of the rules.
12 These were indicated last night at 9:16 p.m. that they
13 wanted to use these with this witness, and I am -- and
14 I am manifestly unprepared to cross-examine him on
15 these rules if he is going to testify about them. I
16 don't mind the court seeing them, but I do object to
17 any testimony based on the rules.

18 THE COURT: He is not, of course, the
19 only witness to have mentioned these. It's been
20 mentioned a number of times that these rules would go
21 into effect. I think it's necessary that the court
22 take judicial notice. So without objection, the court
23 will do so.

24 Let me see if I can get the proper citation
25 here under the Arkansas, I take it, Administrative

1 Code -- Arkansas Code Annotated here, it appears,
2 Section 2201.1 through -- no. I'm sorry. That's the
3 statutory citation.

4 Is there an Oklahoma -- or Arkansas
5 Administrative Code section here? It's 2201.1 through
6 2206.4, looks like Title 22.

7 MR. BASSETT: Yes, sir.

8 THE COURT: The court will take judicial
9 notice of those administrative rule revisions.

10 MR. BASSETT: Your Honor, yes, I have
11 also as a part of that -- and it's also in that same
12 packet -- you'll see another document at the top. It
13 says, "Revised Arkansas Phosphorus Index." It has
14 some several names on there, Phillip Moore, Andrew
15 Sharples, and others. It should be attached to
16 the -- let me just -- perhaps I can just hand up a
17 copy of it.

18 THE COURT: I notice that protective
19 rates are part of this supposed new regulation. I
20 thought the testimony was that protective rates are
21 out the window as of December 31st, 2006?

22 MR. TUCKER: Judge, that relates to
23 commercial fertilizer, chemical fertilizer.

24 THE COURT: All right. Please.

25 MR. BASSETT: I'll just hand this up, if

1 that will be helpful.

2 MR. NANCE: Your Honor, we do object to
3 use admission of what was designated to us as Exhibit
4 8132 after 9 p.m. last night. We've had less than 12
5 hours' notice that this would be used today.
6 Obviously, that violates the pretrial order and is
7 prejudicial to the state, particularly if there's
8 going to be any substantive testimony about it.

9 THE COURT: Is 8132 an exhibit
10 designated in the pretrial order?

11 MR. NANCE: It is not.

12 MR. BASSETT: No, sir. But, Your Honor,
13 it wouldn't have been available at that time. This
14 is -- this is in connection with the new phosphorus
15 index.

16 In response to what Mr. Nance just said,
17 yeah, I don't think we inadvertently did not get them
18 a copy until late last night. I'm not going to ask
19 this witness any questions about it. What I do want
20 to point out and what I think is most important is,
21 let me refer the court to the -- to what just was
22 taken in by judicial notice and refer the court to
23 page 2, Section 2201.4B. I think you're there, Your
24 Honor.

25 THE COURT: Yes, sir.

1 MR. BASSETT: You're usually faster than
2 the rest of us getting there.

3 At Section 2201.4B, this is the section on
4 the new regulations on definitions, and it explains
5 the revised phosphorus index and how it works. What
6 we are now asking the court to also take judicial
7 notice of is clearly referenced here in the
8 regulations -- and Your Honor can read what it says
9 there -- but that needs to be a part of what the court
10 is receiving in order to get the full context and to
11 understand what these new regulations are saying.
12 It's incorporated in the law --

13 THE COURT: All right.

14 MR. BASSETT: -- just like Oklahoma Code
15 590.

16 THE COURT: I'm going to give Mr. Nance
17 a bit of time to consider that. We're not going to
18 take judicial notice of that at this point given the
19 timing. It's a good question as to whether or not
20 reference to this specific article in the regulation
21 means that the article should be taken into
22 consideration and the court should give judicial
23 notice to it given that it's basically the heart and
24 soul and guts of the rule.

25 But I take it it's something of a surprise

1 here, Mr. Nance?

2 MR. NANCE: It is, Your Honor. And it's
3 not listed in the pretrial order, even though
4 evidently it was written sometime in 2009. If you
5 read the -- if you read the very rule you've just been
6 referred to, this is in the --

7 THE COURT: Of course we've been going
8 for quite some time in 2009. I don't know when this
9 was adopted. Let me give you a little time to gather
10 your response to that, Mr. Nance.

11 MR. NANCE: Yes, sir.

12 MR. TUCKER: If I may, Your Honor, just
13 for record just so there's no misunderstanding. That
14 is the identical documents that I offered to the court
15 and suggested judicial notice be taken at the
16 conclusion of Mr. Taylor's testimony prior to the
17 Christmas recess.

18 THE COURT: Yes, sir.

19 MR. TUCKER: So it's actually quite a
20 bit -- it's several days' notice as opposed to a few
21 hours' notice of the existence of it.

22 As to the second point about timing, public
23 comments for written changes were still being accepted
24 as recently as mid November of 2009 so it would be
25 rather difficult to list it on the pretrial order.

1 THE COURT: All right. It's about time
2 for a break. Let's take our mid-morning recess.

3 *(Short break)*

4 THE COURT: Mr. Bassett. Do we want to
5 proceed on this issue with regard to taking judicial
6 notice of the index referenced in the rule, Mr. Nance?

7 MR. NANCE: Yes, Your Honor, we do. We
8 object to taking judicial notice of it. One, because
9 the pretrial order has a 72-hour rule that needs to
10 mean something and 12 hours is not 72 hours; secondly,
11 whenever this thing came out, the defendants could
12 have down in good order a motion to amend the pretrial
13 order to add it as an exhibit.

14 In doing so, they would -- they would have to
15 meet the stringent standard of manifest injustice by
16 not putting it in. They did not do that. Instead,
17 they surprised us with it last night in a posture
18 where we can't very well deal with it.

19 The fact that the regulation refers to it
20 doesn't change the fact that it's hearsay, it's
21 not -- it's not an exhibit -- is not on the exhibit
22 list, I mean, the pretrial order exhibit list, and the
23 timing is calculated to surprise the state. If they
24 knew about it when Mr. Tucker first tried to get
25 judicial notice taken, they could have -- they could

1 have been more timely in their presentation of it to
2 us.

3 THE COURT: All right. Well, let's
4 separate out the issue of whether or not it's timely
5 for the purposes of this witness from the issue of
6 whether or not the court should take judicial notice
7 of the revised Arkansas phosphorus index as part and
8 parcel of the rule. Because I tend to agree with you
9 in terms of the 72-hour rule, it comes as a surprise
10 for you to prepare.

11 But insofar as it's part of that which
12 arguably needs to be taken into consideration by this
13 court as part of the rule that went into place just a
14 few days ago, January 1st, 2010, the fact that it is
15 just recently developed here, Mr. Tucker says that
16 they were taking comment as late as November.
17 Obviously, we started this trial in late September.
18 Essentially, what Mr. Bassett is asking the court to
19 do is to -- is to revise or amend the pretrial order
20 to take into account this revised phosphorus index,
21 which it doesn't sound to me that there's any dispute
22 that it's now in effect; correct?

23 MR. NANCE: I'm not disputing that fact,
24 Your Honor, no.

25 THE COURT: All right. So if we sustain

1 your motion with reference to allowing this witness to
2 testify about it, as violative of the 72-hour rule, is
3 there any objection to its admission as part and
4 parcel of the new Arkansas rules?

5 MR. NANCE: If I could have a moment to
6 confer?

7 THE COURT: Certainly.

8 *(Discussion held off the record)*

9 MR. NANCE: Your Honor, Mr. Bullock
10 reminds me that coming as it does after the close of
11 our case, we have no way to subject it to any expert
12 testimony on our side of the case. It could have come
13 in before we rested or we had an opportunity to speak
14 to it.

15 Also, Your Honor, having deposed who I think
16 is going to be their phosphorus index expert -- and
17 that's Dr. Coal -- his report and deposition testimony
18 did not speak at all to the Arkansas phosphorus index.
19 He talked about the index from Maryland. So they are
20 now injecting at this untimely date a new issue and a
21 new document that we are not -- we're not aware of an
22 expert who's going to opine on it, and if they did, it
23 would be a new opinion that would be prohibited.

24 So we think that the court should not take
25 judicial notice of it, particularly the way it's

1 developed, and we're prejudiced for not being able to
2 have any expert testimony on it, if need be.

3 THE COURT: Obviously, it's a dynamic
4 set of facts. Go ahead, Mr. Bassett.

5 MR. BASSETT: Yeah, Your Honor. I guess
6 I'll start off -- and I appreciate the comments of
7 counsel over here as a very nice way of presenting
8 himself -- but this is the law we're talking about
9 here, Your Honor. The phosphorus index that is a part
10 of the revised Arkansas regulations is defined as what
11 is in that -- in that document.

12 Whether the regs use language incorporated or
13 not, the index described in what's before the court,
14 that article, is now the law in Arkansas. We are
15 simply asking the court to take judicial notice of
16 that law. We're not -- we're not, you know, intending
17 to ask this witness questions about it. We simply are
18 trying to inform the court as to what the law is in
19 Arkansas.

20 Because, Your Honor -- and I don't want to
21 give a long speech here -- but I do want to say we
22 started, as you pointed out, this trial back in late
23 September. It has been going a long time now. We're
24 into a new year. There has been an enormous amount of
25 discussion during the course of this case about the

1 regulations, the laws in the state of Arkansas, and
2 that has been well hashed out in this court, as Your
3 Honor well knows.

4 As was pointed out by Mr. Tucker and others,
5 the state really didn't ever get into anything that
6 was going on on the other side of 16th Street to use
7 Mr. Tucker's analogy. And we are here today and we're
8 asking the court to take judicial notice of these regs
9 and the new Arkansas PI because we simply think it
10 would be useful and helpful to you as the trier of
11 fact to know what the present and existing regulations
12 are in the state of Arkansas, to know what the law is
13 in the state of Arkansas.

14 THE COURT: Particularly given the fact
15 that this is an action for an injunction, I can't
16 ignore existing realities. It seems to me that to the
17 extent that the new regulation effective January 1,
18 2010, is specifically referenced and adopted -- let me
19 take a look once again at 2201.4B.

20 To the extent that it's part of the law of
21 the state of Arkansas, I believe it has to be taken
22 into consideration relative to any proposed injunctive
23 relief being sought. The court will take judicial
24 notice of the revised Arkansas phosphorus index, which
25 is incorporated as part of Section 2201.4B of the

1 rules governing the Arkansas soil nutrient and poultry
2 litter application and management program effective
3 January 1, 2010.

4 But once again, I'm not going to allow this
5 witness to testify about that index for a couple of
6 reasons. Number one, violation of the 72-hour rule;
7 and number 2, in trying to get the overall explanation
8 from this witness, he admits he's not an expert in
9 that regard.

10 MR. BASSETT: Yes, sir.

11 THE COURT: So go ahead.

12 MR. NANCE: Your Honor, I just -- I
13 understand your ruling and I'm not going to quibble
14 with it. I'm concerned about future expert testimony
15 they may try to slip in based on this document
16 that would be new opinion or we would be prejudiced
17 because we haven't had a chance to have any discovery
18 on or any expert from our side, as need be, to review.
19 I just flag that as a future issue and --

20 THE COURT: Well, if that's a concern
21 and if it comes in, in terms of expert testimony from
22 the defense, then you've got the opportunity for a
23 rebuttal witness.

24 So go ahead.

25 MR. NANCE: Thank you, Your Honor.

1 THE COURT: To further extend this
2 trial.

3 MR. BASSETT: Oh, boy. If we do that, I
4 might even be able to grow a beard. I'm going to need
5 about five or six months, I'm afraid. I'm embarrassed
6 to tell you about previous efforts in that regard.
7 Didn't work out too well.

8 Q. (BY MR. BASSETT) Okay, Mr. Smith. Let's
9 switch topics here.

10 Are you personally involved in the specifics
11 of the enforcement part of these regulations?

12 A. No. That's a separate section of our -- of
13 our commission.

14 Q. Okay. Are you aware of whether
15 investigations of complaints by the public under the
16 regulations are required to be notarized before your
17 agency will investigate?

18 A. Yes, sir, I am.

19 Q. That is a part of the regulations?

20 A. Part of the regulations, part of the
21 legislation.

22 Q. Is that something that your agency was in
23 favor of or against when the laws were being
24 discussed?

25 A. No, we were not in favor of that.

1 Q. Your agency was opposed to it?

2 A. We were.

3 Q. All right. Do you know why a notarized
4 complaint would be required?

5 MR. NANCE: Objection; calls for
6 speculation.

7 THE COURT: Overruled. Go ahead.

8 A. It was part of the legislation that was
9 amended into the -- into the legislation as it passed
10 through the general assembly.

11 Q. (BY MR. BASSETT) Okay. To your knowledge,
12 Mr. Smith, was this part of the law something that any
13 of the poultry companies or officials with those
14 companies sought to have put in there?

15 A. Not to my knowledge.

16 Q. Okay. Do you know, Mr. Smith, how much
17 manpower your agency devotes to plan-writing,
18 investigation of complaints of violations, or to
19 audits of compliance with plans in the Arkansas
20 portion of the IRW?

21 MR. NANCE: Object to the form as
22 compound.

23 THE COURT: Sustained. Rephrase.

24 Q. (BY MR. BASSETT) Do you know how much
25 manpower your agency devotes to plan-writing in the

1 Arkansas portion of the IRW?

2 A. Yes. We -- approximately in the IRW, that
3 is -- we are -- the way we deal with that is by -- is
4 by contracts with the conservation districts to supply
5 technicians to do that. Basically, we have at least
6 two -- two plan writers in each of the counties in the
7 IRW. So for writing the plans itself, we have
8 provided approximately four individuals to write plans
9 in the Illinois River Watershed.

10 Q. Do you know how much manpower your agency
11 devotes to investigation of complaints of violations?

12 A. Investigations in the surplus nutrient areas
13 we have -- it's a combination of two things. We do
14 have staff in our offices, four or five people, that
15 are available to do that. But we also via our
16 contracts with the -- with placing the technicians in
17 the counties in the surplus nutrient areas, we have
18 another, oh, 15 or so individuals that are kind of our
19 first responders to where they're in place in the
20 counties so that they can be contacted for complaints.

21 Q. Does your agency contract with the
22 conservation districts in each county?

23 A. In each county, yes, sir, we do.

24 Q. Okay. Mr. Smith, can you give the court an
25 approximation of the amount of money that the State of

1 Arkansas is spending on plan writers and enforcement
2 activity on the Arkansas side of the Illinois River
3 Watershed?

4 A. Oh, hundreds of thousands of dollars is spent
5 on plan-writing.

6 Q. You earlier mentioned in your testimony,
7 Mr. Smith, a water quality criteria or standard for
8 scenic rivers implemented by the State of Oklahoma,
9 the 0.37 standard. You recall that testimony, do you
10 not?

11 A. I do.

12 Q. Okay. Is that something that your agency,
13 the Arkansas Natural Resources Commission, has set as
14 a target to be met in Arkansas at any particular time?

15 A. We have not set it as a target because, as we
16 discussed before, we believe it to be unachievable.

17 Q. All right. Do you know whether any of your
18 counterparts in Oklahoma who you interact with on
19 these issues through the Compact Commission, or
20 otherwise, share that same belief, that that standard
21 is not achievable?

22 A. They never vocalized to me that --

23 MR. NANCE: Objection. It calls for
24 speculation, particularly if they never vocalized
25 it.

1 THE COURT: Sustained.

2 Q. (BY MR. BASSETT) All right. Mr. Smith, do
3 you know whether a TMDL for the Illinois River
4 Watershed has ever been considered by the State of
5 Oklahoma?

6 A. It's been discussed several times in the past
7 at our Compact meetings the fact that -- that
8 Oklahoma, for example, their DEQ was considering
9 developing a TMDL for the watershed.

10 Q. Okay. Has one been done in Oklahoma to your
11 knowledge?

12 A. Not to my knowledge.

13 Q. Now, let me ask you -- or switch topics
14 here -- not really switch topics but move to a
15 different area.

16 Mr. Smith, are you aware that the
17 Environmental Protection Agency has now very recently
18 advised that it's doing a TMDL for the IRW?

19 A. Yes. We've been advised by the Dallas region
20 that they -- that they have moved forward with
21 starting their TMDL exercise on the Illinois River,
22 both in Arkansas and in Oklahoma.

23 Q. That would be Region 6 of the EPA; is that
24 right?

25 A. That's correct.

1 Q. Are you personally involved in that process,
2 Mr. Smith?

3 A. Yes. In this particular exercise, it's
4 somewhat unusual. But when the notice went out, the
5 state asked to be involved early on in the writing in
6 the production of this TMDL. So representatives from
7 both our DEQ -- our Department of Environmental
8 Quality -- and the Natural Resources Commission were
9 asked to give some technical advisors to work with the
10 contractor that they have selected to do that. So
11 that's going to be my involvement in this exercise.

12 Q. All right. And has the EPA already selected
13 a contractor?

14 A. They have. It's AQUA TERRA, I believe.

15 Q. All right. Have you met, Mr. Smith, with the
16 EPA or anyone else about this current TMDL process?

17 A. The EPA did call a meeting in November --

18 MR. NANCE: Your Honor, I object.
19 That's nonresponsive to the question.

20 THE COURT: Sustained. The question
21 was, have you met with the EPA or anyone else about
22 this current TMDL process.

23 Q. (BY MR. BASSETT) Have you been to a meeting,
24 Mr. Smith?

25 A. Yes, I have.

1 Q. Where was that meeting?

2 A. The meeting was in Dallas.

3 Q. And on what date was that meeting?

4 A. November the 20th.

5 Q. All right. And can you tell me who -- or
6 strike that.

7 You were there in what capacity?

8 A. Representing the Natural Resources
9 Commission.

10 Q. All right. Are you in the process of getting
11 data and information to the EPA?

12 A. We were advised that -- yes, we were. And we
13 were advised at the meeting that this is -- this is --
14 they have initiated the study, they're in the early
15 phases --

16 MR. NANCE: Your Honor, again it's not
17 nonresponsive and it's a narrative and it sounds a lot
18 like hearsay.

19 MR. BASSETT: I'm just asking, Your
20 Honor, what data or what information that this
21 gentleman has been asked to provide.

22 THE COURT: The objection as to the
23 answer is sustained.

24 The question, Mr. Smith, was, are you in the
25 process of getting data and information to the EPA.

1 THE WITNESS: Yes. Yes, I am.

2 Q. (BY MR. BASSETT) And what would that data
3 and information be?

4 A. That would be the data that we have
5 contracted for that would be useful to them in their
6 data acquisition. For example, the data that's been
7 collected by the University of Arkansas through all of
8 the monitoring aspects that we've talked about before,
9 we wanted that to be made available to the contractor.

10 Q. Okay. If you've got your folder there, would
11 you please pull out Defendants' Joint Exhibit 8129?

12 A. Twenty-nine?

13 Q. Yeah, 8129. Have you got that in front of
14 you there, Mr. Smith?

15 A. I do.

16 Q. All right. Would you please tell the court
17 what this is?

18 MR. NANCE: I object to a reference to
19 this exhibit. It's not in the pretrial order. It was
20 just -- it was disclosed 72 hours ago, but there's
21 been no motion to amend the pretrial order to add this
22 exhibit and no demonstration of manifest injustice if
23 it doesn't come in.

24 MR. BASSETT: Your Honor, may I respond?

25 THE COURT: Yes, sir.

1 MR. BASSETT: Okay. To begin, no, it
2 was not on the pretrial order because this is
3 something that just occurred. Of course, the pretrial
4 order was submitted months ago.

5 The reason why we are interested in
6 showing -- or trying to admit into evidence this
7 particular exhibit and several others is to kind of
8 follow up on the letter that the court allowed in --
9 or that was offered into evidence by the defendants
10 when Secretary Strong was on the witness stand. That
11 was that letter -- actually, just for the record, that
12 was Defendants' Joint Exhibit 8090.

13 What we're trying to do here -- none of this
14 was available until just recently. We think this is
15 relevant. We thought the court might want to receive
16 this exhibit and several others to follow into
17 evidence in the interest of justice just to know what
18 the EPA is doing with respect to the TMDL since that
19 letter of October 1st went to commissioners -- or
20 excuse me -- to Secretary Strong and to Teresa Marks
21 of the Arkansas Department of Environmental Quality.

22 The process of developing the TMDL was
23 further down the road since that letter of October
24 1st, and we simply believe that this information would
25 be helpful to the trier of fact and this is something

1 that the trier of fact ought to know about.

2 And finally, Your Honor, when it comes time
3 for the court to reach a decision in this case, we
4 believe that the work being done by the EPA to develop
5 and prepare a TMDL for the IRW should be something
6 taken into consideration by the court. This exhibit
7 and several to follow simply show what has transpired
8 since October 1st, what transpired at this meeting,
9 and what is being done.

10 MR. NANCE: If I may, Your Honor. The
11 whole point of a pretrial order and discovery cutoff
12 of listing exhibits and witnesses is to frame what's
13 going to be tried. And, of course, there are things
14 going on outside the scope of this courtroom that
15 might be interesting, but we still have the pretrial
16 order to deal with and the issues that are presented.

17 In addition to the pretrial order issues, I
18 question the relevance of any meeting in Dallas to any
19 issue, even a remedy issue, because a TMDL, I think as
20 we maybe have beat the horse dead, doesn't have any
21 effect on nonpoint sources but only on permits under
22 the NPDES system.

23 I think you've ruled earlier on that the
24 Clean Water Act doesn't displace any issue here. It's
25 not going to take over and solve the problem by a

1 TMDL. It's a distraction from the issues as they were
2 framed. It doesn't really have anything to do with
3 any issue in the pretrial order. It's just a rabbit
4 trail that does not get us anywhere that the court
5 needs to go to in dealing with the issues that have
6 been framed.

7 MR. BASSETT: Your Honor, may -- I'm
8 sorry. I didn't mean to interrupt Mr. Nance.

9 I would like to point out -- and I think this
10 was clear from the Defendants' Joint Exhibit 8090 that
11 already came in -- that the TMDL by the EPA is
12 addressing both point and nonpoint sources of
13 phosphorus throughout the IRW?

14 THE COURT: That's what I thought. I
15 thought that that was clear from the testimony of
16 Mr. Thompson --

17 MR. BASSETT: Yes. Absolutely.

18 THE COURT: -- the day before we left;
19 correct, Mr. Nance?

20 MR. NANCE: Different -- different TMDL
21 effort.

22 THE COURT: No, I understand. But it
23 all plays into the same issue. It is a TMDL for the
24 IRW. Mr. Thompson admits that he made the executive
25 decision to stop work on the TMDL. They have a draft

1 TMDL in Oklahoma, but he believed it unfairly pointed
2 the finger at point sources rather than nonpoint
3 sources.

4 This obviously came in to this case by virtue
5 of the deposition of Mr. Thompson well before this
6 trial began. I believe it was what, early in 2009
7 when Mr. Thompson's deposition was taken?

8 MR. NANCE: I believe so. I don't
9 remember the date.

10 MR. BASSETT: That's correct, Your
11 Honor.

12 THE COURT: And I believe Mr. Thompson
13 talked about this being -- a TMDL being the best tool
14 we have available for dealing with pollution, point
15 and nonpoint source, did he not?

16 MR. NANCE: He did. But he said it was
17 unfair because it allocated the cuts to the point
18 sources rather than to the nonpoint sources.

19 THE COURT: I understand. But, I mean,
20 we have to get to the truth here.

21 It seems to me that it begs the question as
22 to how far along in this TMDL process we are. Any
23 ideas? Maybe we're trying to look in a crystal ball.

24 MR. BASSETT: Your Honor, I --

25 THE COURT: Mr. Bassett.

1 MR. BASSETT: I can -- are you wanting
2 me to ask the witness or respond to that?

3 The TMDL process is moving forward which is
4 what Mr. Smith who's been at the meeting is prepared
5 to testify to. They also have a time line that's been
6 established and also have established when they want
7 to complete it, the entire TMDL process.

8 MR. NANCE: It just started, Judge.
9 This was the organizational meeting.

10 THE COURT: Well --

11 MR. BASSETT: I don't want to keep
12 arguing back and forth. I'll respond if the judge
13 wants anything.

14 THE COURT: I understand. I don't know
15 that it's necessary that we know who was at this
16 meeting. We already had testimony that it occurred on
17 November 20th, 2009.

18 The objection's sustained as to Defendants'
19 Joint Exhibit 8129.

20 MR. BASSETT: Okay.

21 Q. (BY MR. BASSETT) Mr. Smith, has the
22 EPA based on -- you attended this meeting; correct?

23 A. Yes, sir, I did.

24 Q. And we've already established it was on
25 November the 20th of 2009?

1 A. Yes, sir.

2 Q. Has a time frame or time line been
3 established for this TMDL process?

4 A. Yes. We were -- we were advised that EPA
5 expects the time frame to be about 18 months to
6 complete the TMDL.

7 Q. All right. Now, we're not going to put in --
8 because I've listened very carefully to the judge, I'm
9 not going to put in the attendee list, but you've
10 already told us that you were at that meeting. Was
11 any representatives from the state agencies in
12 Oklahoma at that meeting?

13 A. There were.

14 Q. Who was there from Oklahoma?

15 A. Jon Craig was there and Mark --

16 Q. Derischweiler?

17 A. Derischweiler. Thank you.

18 Q. All right. I hope the court reporter doesn't
19 want me to spell that.

20 Anybody else from Oklahoma that was at that
21 meeting?

22 A. That was the only Oklahoma attendees that I
23 recall.

24 Q. Were there other representatives from
25 Arkansas agencies at that meeting?

1 A. There were. Our DEQ had several
2 representatives there, including their director,
3 Teresa Marks.

4 Q. All right. Obviously, there were
5 representatives there from the Environmental
6 Protection Agency?

7 A. Oh, several.

8 Q. Now, the contractor, AQUA TERRA, did they
9 have representatives at that meeting?

10 A. My recollection is they had two members of
11 their staff there.

12 Q. Okay. Was there -- strike that.

13 To your knowledge, has any change to the .037
14 standard been considered so far as a part of the TMDL
15 process now going on with the EPA?

16 A. Well, going back to our statement of joint
17 principles, we certainly expect Oklahoma to complete
18 their review of that standard. There was discussion
19 at the meeting itself about what would occur were
20 Oklahoma to change that standard.

21 Q. Okay. I'll stop you right there. I'm not
22 going to ask anything else that was said by anybody.

23 Okay. Just for the record, Mr. Smith, what
24 is your understanding about whether the TMDL by the
25 EPA will address both point and nonpoint sources of

1 phosphorus throughout the IRW?

2 A. Yes, it would have to. You know, it would
3 look at really -- in that arena really three things.
4 It looks at background loading that would -- that
5 occurs. It also looks at the contribution of point
6 and nonpoint sources.

7 Q. Do you have an understanding -- based on your
8 involvement in this process and your attendance at the
9 meeting and so forth, do you have an understanding as
10 to whether hydrologic water quality models will be
11 used by the EPA contractor to develop the TMDL?

12 A. There are actually three models that were
13 discussed as potential models that would be used by
14 the contractor.

15 MR. NANCE: Your Honor, this is hearsay,
16 discussing what people said at the meeting.

17 THE COURT: Sustained.

18 Q. (BY MR. BASSETT) Do you have personal
19 knowledge as to what models are going to be -- are
20 being considered for use, Mr. Smith?

21 A. I do.

22 MR. NANCE: It would necessarily be
23 based on hearsay from discussions at the meeting.

24 THE COURT: Sustained.

25 Q. (BY MR. BASSETT) When the TMDL is completed,

1 Mr. Smith, what's your understanding of the effect it
2 would have on the activities in the IRW?

3 MR. NANCE: Your Honor, calls for
4 speculation. It's 18 months out.

5 THE COURT: Well, regardless of the
6 number of months out, I do believe it's speculative.
7 Sustained.

8 Q. (BY MR. BASSETT) Well, however --

9 MR. BASSETT: Well, strike that, Your
10 Honor. Just one moment here. Your Honor, if I could
11 have just one moment?

12 THE COURT: Yes, sir.

13 *(Discussion held off the record)*

14 Q. (BY MR. BASSETT) Have goals been set by the
15 EPA in this process?

16 MR. NANCE: Object to the form. It's
17 vague.

18 Q. (BY MR. BASSETT) Are you -- strike that.

19 Are you part of the planning process,
20 Mr. Smith, in connection with the group that's been
21 formed for the --

22 A. Yes. I've been named as one of the technical
23 advisors at EPA's request.

24 Q. All right. What goals have been set?

25 MR. NANCE: Relevance, Judge. And,

1 again, it would be based on hearsay.

2 THE COURT: Well, he's part of the
3 planning process in this group so he would be -- well,
4 let's firm this up. Sustained.

5 Go ahead, Mr. Bassett.

6 Q. (BY MR. BASSETT) Okay. You have already
7 testified you're a part of the process and you are a
8 part of this group; correct?

9 A. That's correct.

10 Q. Okay. And you were also providing
11 information that's been requested, data and
12 information?

13 A. That's true. We were told that this was the
14 initiation of it in the data-gathering phase.

15 It might be good to point out, Your Honor,
16 that typically --

17 MR. NANCE: He's telling us what he's
18 been told and what's been said at the meeting; it's
19 hearsay.

20 THE COURT: I don't know that to be the
21 case. Overruled.

22 Go ahead.

23 Q. (BY MR. BASSETT) Go ahead.

24 A. Normally, the TMDLs are done, a contractor is
25 hired, he goes through and he completes his TMDL work,

1 and then that document is presented for comment by EPA
2 before, and then it comes back and EPA either -- it
3 goes through their adoption procedures.

4 This is somewhat unusual in that EPA has
5 allowed the states to have input into the process as
6 the contractor's going through the process itself. So
7 just pointing out that this is an unusual case and
8 departs from their typical way that a TMDL process is
9 developed. We're quite grateful that they are because
10 of the importance this TMDL has for the entire
11 watershed.

12 Q. Okay. Mr. Smith -- and you may have touched
13 on this briefly earlier -- with regard to the 319
14 programs in the IRW that your agency's been involved
15 in, there was some discussion about the CREP program,
16 conservation reserve enhancement program, you briefly
17 mentioned that earlier.

18 Can you tell us what is now ongoing in the
19 IRW with that CREP program that your agency's involved
20 in?

21 A. Well, it's -- it has -- we finally got the go
22 ahead. It's underway right now. They're going
23 through the sign-up procedure for individuals to sign
24 up for those cost-share provisions on their property
25 right now. It's in that initiation phase so our task

1 right now is to get the word out that those are
2 available. So we're involved in the information -- in
3 that information exchange right now as well as
4 providing administration help to the federal agencies
5 in that project.

6 Q. Okay. And is the federal government involved
7 in these 319 programs in any way?

8 A. Well, EPA is involved in the 319 programs,
9 yes, sir, they are, heavily.

10 Q. All right. And how are they involved?

11 A. Well, for two ways. First of all,
12 they're -- they're the funding vehicle for the
13 projects themselves. As well as when we receive our
14 allocation for funding in the year we know how much
15 money there is, then we take that and we propose
16 projects to utilize that funding, the funds that are
17 made available. All of those proposals and
18 applications go to Dallas for approval so each project
19 that we fund through the 319 project has to be
20 approved by Dallas.

21 Q. Okay. With regard to the studies of the
22 watershed that are a part of the programs sponsored by
23 your agency in the IRW, does your agency provide
24 reports or results to the federal government or to the
25 EPA on the results of those projects?

1 A. We do. We're required to submit an annual
2 report to EPA on the results of those projects
3 annually.

4 Q. Have there been any nonpoint source
5 comprehensive management plans or strategies developed
6 by your agency for the IRW?

7 A. Oh, yes, sir, there have.

8 Q. Such as?

9 A. Well, I mentioned the annual reports
10 themselves, as well as our overall nonpoint management
11 plan that's also a requirement by EPA.

12 Q. And why is that a requirement?

13 A. Well, recently in the last several years, EPA
14 has informed us that a nine-element watershed plan is
15 going to be required in order to continue to receive
16 funds. So in each of the watersheds that we're
17 having -- we're underway with development of what they
18 call their nine-element watershed plan.

19 Q. Is it your understanding, Mr. Smith, that
20 your agency, the Arkansas Natural Resources
21 Commission, has legal authority and jurisdiction in
22 Arkansas over agricultural nonpoint-source discharges
23 in nutrient-sensitive watersheds?

24 A. We do.

25 Q. Okay. And in that role, what has been your

1 experience, as far as the EPA's interest and
2 involvement with what your agency does, with regard to
3 nonpoint sources in the IRW?

4 A. Well, they're certainly quite interested in
5 that, and as I mentioned, we do report those things to
6 them on an annual reports.

7 Q. Okay. To your knowledge, has the EPA or any
8 other federal agency ever directed your agency, the
9 Arkansas Natural Resources Commission, that land
10 application of dry poultry litter constitutes a
11 nuisance in the IRW?

12 A. No, sir.

13 Q. To your knowledge, has the EPA or any other
14 federal agency ever taken action to eliminate or limit
15 dry poultry litter applications in the IRW?

16 A. No, sir.

17 Q. Has the EPA or any other federal agency ever
18 informed you or your agency that a Nutrient Management
19 Plan that Arkansas has adopted or endorsed is
20 violating either state or federal law in any
21 environmental media?

22 A. No, sir.

23 MR. BASSETT: Your Honor, might I have
24 just a moment?

25 *(Discussion held off the record)*

1 MR. BASSETT: Your Honor, I'm just about
2 done, but I'm going to make one more stab at something
3 that I fell a little short on and I promise I'll sit
4 down.

5 THE COURT: All right.

6 MR. BASSETT: This goes back to the
7 questions I was asking about the TMDL -- EPA TMDL.

8 Q. (BY MR. BASSETT) Mr. Smith, as part of the
9 planning process, have you been advised of the models
10 that are being considered by the contractor -- the EPA
11 contractor on the TMDL?

12 A. Yes, sir.

13 MR. NANCE: Hearsay, Your Honor.

14 THE COURT: Sustained.

15 MR. BASSETT: Okay. I think, Your
16 Honor, a real smart lawyer might be able to figure out
17 a way to get around that, but I can't. So I'm going
18 to -- unless somebody over here tells me I have
19 something else -- Your Honor, just one moment.

20 THE COURT: All right. Mr. Smith, with
21 regard to one of the questions that Mr. Bassett asked
22 you, he asked whether the EPA had ever directed your
23 agency that land application of dry poultry litter
24 constitutes a nuisance.

25 Does the EPA ever make the determination of

1 whether or not something constitutes a nuisance?

2 THE WITNESS: You know, probably not. I
3 would suspect that it would be through the 305(b)
4 reports where impaired watersheds are listed.

5 THE COURT: Yeah. They don't make
6 determinations of specific nuisances, do they?

7 THE WITNESS: Not that I'm aware of.

8 THE COURT: Right.

9 MR. BASSETT: Your Honor, I apologize,
10 but I want to take one more run here.

11 Q. (BY MR. BASSETT) Mr. Smith, would you pull
12 out from your packet Defendants' Joint Exhibit 8131?

13 *(Discussion held off the record)*

14 A. Yes, sir, I have it.

15 Q. (BY MR. BASSETT) All right. Let me ask you
16 a few questions about it.

17 At the meeting with the EPA in Dallas on
18 November 20th of 2009, was a PowerPoint presentation
19 made to you and other attendees on water quality
20 modeling?

21 A. Yes, sir, it was.

22 Q. And did the PowerPoint discuss the models
23 that were being considered to model the watershed?

24 A. They were.

25 Q. Did the PowerPoint discuss the model that was

1 being considered to model the in-stream processes?

2 A. It did.

3 Q. Okay. And Defendants' Joint Exhibit 8131
4 that you're holding in your hands there, is that the
5 PowerPoint that was presented to you and to the other
6 attendees at the meeting in Dallas on November 20th?

7 A. Yes, sir, it is.

8 MR. BASSETT: Okay. Your Honor, I would
9 move into evidence Defendants' Joint Exhibit 8130.

10 MR. NANCE: In addition to the timing
11 issues and the pretrial order issues we've mentioned
12 before, Your Honor, it's still hearsay. It's an
13 out-of-court statement that's being offered for the
14 truth of the matter.

15 THE COURT: Sustained.

16 MR. BASSETT: I pass the witness, Your
17 Honor.

18 THE COURT: Mr. Nance.

19 MR. NANCE: Your Honor, in the spirit of
20 the season, I would like to point out that I've talked
21 with counsel from Ole Miss about how cooperative my
22 OSU Cowboys were in helping them in the Cotton Bowl.

23 THE COURT: The offense, not the
24 defense.

25 MR. NANCE: Enough said.

CROSS-EXAMINATION

BY MR. NANCE:

Q. Good morning, Mr. Smith.

A. Good morning, sir.

Q. You were on the engineering committee for the Compact Commission and such. In your normal day-to-day work, what sort of engineering do you do for the ANRC?

A. Well, I'm a civil engineer by training. I'm really in a supervisor role right now, you know, in my context now, but it's basically in the civil engineering connotation.

Q. Well, doesn't your particular part of the ANRC deal more with making sure that sufficient quantities of water are available rather than water quality?

A. Oh, certainly the major thrust of our agency is water quality. This nonpoint is the one element of the quantity issue that we have. Our DEQ certainly handles the bulk of the water quality issues in the state of Arkansas.

Q. Isn't most of your work personally quantity rather than quality?

A. Yes, sir, it certainly is. That's a fair statement.

1 Q. And is your particular section of the ANRC
2 the one that does the sampling or contracts the
3 sampling?

4 A. No. We made the choice long ago rather than
5 to try to staff up to do sampling, that it would be
6 much more efficient for us to rely on data that was
7 being gathered by others and contract those parts that
8 we needed.

9 Q. But is your particular section the one that
10 does the contracts?

11 A. Yes.

12 Q. Okay. Now, in the monitoring that you
13 do -- well, let me -- you do monitoring for the
14 Compact Commission work, the 40 percent reduction
15 work, that was the same kind of monitoring that was
16 done for the Clean Lakes study; is that right?

17 A. Yes, sir, that's correct.

18 Q. And you don't use for that purpose the
19 intensive monitoring that you do at the state line --
20 or your contract done at the state line?

21 A. That's true, and precisely for that reason.
22 It needed to be gathered in the same manner than the
23 baseline data was gathered for the Clean Lakes
24 study.

25 Q. And how do you gather that baseline data?

1 A. We simply utilized the data that had been
2 collected in that same time frame, the 1980 to 1993.

3 Q. I'm sorry. I wasn't clear.

4 As you get new data, like the baseline data,
5 how do you collect that new data?

6 A. Well, since the data back in that time frame
7 was selected by our DEQ, we simply rely on the
8 continued collection of that data by our DEQ to use
9 for the -- for the calculations of the annual
10 loadings.

11 Q. So does the DEQ go out periodically at these
12 four stations and take a sample?

13 A. Yes, sir, they do.

14 Q. How often do they go out, sir?

15 A. I believe monthly, bimonthly, something like
16 that.

17 Q. So they go out one or two times a month and
18 take a sample?

19 A. That's correct.

20 Q. Do they have a set schedule that they use
21 when they go out there to do those samples?

22 A. Pretty much the same time every
23 month -- every month. On the same frequency every
24 month.

25 Q. And then when they get that data, do they do

1 an average -- or the average readings for the month
2 and that's rolled into your five-year average -- to
3 your year and then into your five-year average?

4 A. Yeah. Yes, sir, they were. And that's the
5 reason these particular stations were utilized because
6 they are at the same point that there is a USGS, U.S.
7 Geological Survey, flow gauge. So we have available
8 at that point the concentrations of the element that
9 we're monitoring as well as we know what the flow was
10 when that sample was taken.

11 Q. Okay. Now, this 40 percent reduction that
12 you told the court about, that would be intended
13 simply to stabilize the level of eutrophication in
14 Lake Tenkiller; right?

15 A. That's my understanding of the -- of the
16 conclusions of that study was that a 40 percent
17 reduction would stabilize eutrophication in Lake
18 Tenkiller.

19 Q. Now, the exhibit that was admitted, 3573,
20 that's for calendar year 2007; isn't that right?

21 A. I believe so, sir.

22 Q. You've seen the data from -- that was
23 collected during calendar year -- well, calendar year
24 2009 for 2008 data? Haven't you seen that?

25 A. Yes. We -- the Compact meets in September so

1 there's one prepared every year. So yes, sir, it was.

2 Q. And in point of fact, didn't the phosphorus
3 levels for 2008 data go back up over the 40 percent
4 reduction?

5 A. Not with the five-year rolling average, no,
6 sir.

7 Q. I'm just talking about the data for that one
8 year.

9 A. Well, for that one year, I'd have to look and
10 make sure. But as we pointed out, the reason for the
11 five-year rolling average is to dampen out those
12 climatological changes that we see, the variations in
13 rainfall that we have. That was a key part of the
14 calculations that we agreed to.

15 Q. Look at Exhibit 3573, if you would, please.
16 Let's flip back to --

17 A. Seventy-three?

18 Q. That's the -- that's your report.

19 A. Yes, sir, I have it here.

20 Q. Okay. Let's look at page 8 in particular.
21 That's the one that has the annual readings of the
22 data.

23 Do you see the reading for the Illinois River
24 south of Siloam Springs there on the left-hand side of
25 the page?

1 A. Yes, sir, I do.

2 Q. It shows for 19 -- for 2006 rather -- a flow
3 of 290 cubic feet per second; isn't that right?

4 A. Yes, sir, that's correct.

5 Q. And that's one of the lower flows that are
6 listed there for that station; right?

7 A. Certainly it is, yes.

8 Q. And that's because 2006 was a pretty dry
9 year; right?

10 A. Yes, sir.

11 Q. And you're not telling the court that if a
12 wet year came along, that you wouldn't get more
13 loading at that station, are you?

14 A. Well, yes, sir. Typically, if you have more
15 runoff, you will -- you will have more phosphorus pass
16 that point. If you -- as a matter of fact, if you
17 just look up, if you look at 1990 and 1993 in that
18 same table, you will see that there were high flows
19 during -- during those years.

20 So what we experienced -- and that's one of
21 the things the engineering committee struggled with --
22 is how do you account for, how do you understand not
23 only what's happening on the ground, but how does that
24 flow regime, how does the rainfalls, the wet and dry
25 years, interact in that?

1 And not only that, since this is a -- this is
2 a standard that's set up for Lake Tenkiller itself,
3 what happens in those wet years -- the Clean Lakes
4 study didn't address storm flows, for example. What
5 happens when you have a storm flow?

6 We know from our intensive modeling that
7 sometimes 70 or 80 percent of the phosphorus loading
8 happens in those storm events. What happens when that
9 gets to Tenkiller? Does it blow past Tenkiller? Does
10 it just go on out?

11 There were storm flows in 1980 to '93, but
12 the contractors didn't have this kind of data
13 available to them. So this whole regime of wet/dry
14 years is one that we struggled with to try to
15 understand and are still trying to understand. You
16 know, our recent modeling efforts try to encompass
17 some of these storm flow events now. Both Arkansas
18 and Oklahoma --

19 Q. Okay.

20 A. -- are trying to capture that to have a
21 little better understanding of what happens in these
22 storm flow events.

23 Q. And you say the people that did the Clean
24 Lakes study didn't study storm flow events?

25 A. Well, they didn't have the data. There was

1 not a body of data that specifically recorded those
2 storm flow events. They were all done, as you suggest
3 in your thing, that periodically at set times of the
4 month they were taken. So it was hit or miss as to
5 whether they captured a storm flow event. If it
6 occurred on the days that sampling did, then yeah, you
7 got a reading for a storm flow. If it didn't occur,
8 then of course you missed that storm flow.

9 Q. Right. And you have maintained that
10 particular sampling regime in your reports to the
11 Compact Commission?

12 A. Oh, certainly. And as I mentioned, it's the
13 only way we can get a true comparison via the Clean
14 Lakes study to compare that to see how we're making
15 progress toward the 40 percent goal. If we did
16 anything differently, then we would be comparing --
17 the data wouldn't be consistent with what the
18 contractor used in the preparation of the Clean Lakes
19 study.

20 Q. And you would have to agree with me that the
21 sampling regime you're using now does not catch most
22 of the storm flow?

23 A. Oh, I'd certainly -- it would be remarkable
24 if it collected -- if it caught all the storm flow
25 events.

1 Q. Okay. And so 70 or 80 percent of the flow of
2 the phosphorus loading comes out in storm flow events;
3 right?

4 A. Typically -- you know, it depends. For
5 example, if you have a -- if you have a long dry
6 period and then have a real heavy rainfall event,
7 you're going to see a lot of phosphorus movement. If
8 you've had one storm event and then right behind that
9 another front comes through and then another front
10 comes through, you'll see -- you know, you'll see less
11 of it. It's that first flash after a long dry period
12 that you typically will see a lot more of the
13 phosphorus movement.

14 Q. All right. And that's because the flash
15 after a dry spell moves a lot of phosphorus off the
16 soil surface and into the streams?

17 A. And stirs up some of the sediments in the
18 stream itself. So the point being that you got to
19 understand the context of that. It's not just the
20 storm event. It's also when the storm event occurred
21 and what's occurred prior to that to really get a good
22 feel for what's happening in the watershed itself.
23 And these are all things that we have learned from
24 that intensive monitoring that we have done.

25 Q. But at least part of what happens is that

1 there's a lot of phosphorus that's moved off the land
2 by that storm and into the streams?

3 MR. MCDANIEL: Excuse me, Your Honor.
4 Mr. Nance objected that this was not a disclosed
5 witness and the court honored those objections, and
6 now he's trying to make him into an expert on the
7 stand. I object.

8 THE COURT: Sustained.

9 MR. NANCE: Your Honor, may I approach?

10 THE COURT: Yes, sir, you may.

11 Q. (BY MR. NANCE) You said a moment ago you'd
12 have to look at the figures on last year's report.
13 I've handed you what is a draft of the Arkansas water
14 quality monitoring report that shows calendar year
15 2008 data.

16 Are you familiar with that?

17 A. Yes.

18 Q. Let us just look -- I didn't give one to the
19 court.

20 MR. NANCE: Your Honor, would you like
21 one of these?

22 *(Discussion held off the record)*

23 MR. HOPSON: Is there an exhibit number?

24 MR. NANCE: No. I'm just using this for
25 examination of him and for impeachment.

1 MR. MCDANIEL: Your Honor, I think we
2 need a little foundation since this is purported to be
3 from the commission, it's got handwriting on it, a
4 draft. I think it's inappropriate to start using it
5 for cross-examination without any foundation for this
6 information whatsoever.

7 THE COURT: Overruled. Go ahead.

8 Q. (BY MR. NANCE) Does this appear to be a
9 draft of the Arkansas portion of the report to the
10 commission?

11 A. Yes, sir, it does.

12 Q. Okay. And --

13 MR. TUCKER: Your Honor, I'd like
14 something a little bit more definitive that it appears
15 to be.

16 Q. (BY MR. NANCE) Is it a draft?

17 A. It's a draft, yes.

18 Q. Okay. Is it something that someone in your
19 agency has prepared?

20 A. My staff prepares the Arkansas portion of the
21 report for the Compact Commission.

22 Q. And is it a true and correct copy of the
23 document that you or your staff prepares?

24 A. It appears to be.

25 Q. Let's look at the bottom of the second page

1 and talk about the data that was gathered in -- well,
2 the five-year data first for 2008. Let's again look
3 at that Arkansas River ARK06 station. Do you see
4 that?

5 A. I do.

6 Q. And the five-year average went up
7 substantially from the '03-'07 period to the '04-'08
8 period, did it not?

9 A. It did.

10 Q. Okay. And would that have been as a result
11 of having a wet year like we talked about before?

12 A. It certainly would, in that there's nothing
13 that's happened on the watershed that would induce
14 that kind of change.

15 Q. Okay. Let's look at the next to last page,
16 Mr. Smith, because these are not numbered.

17 A. Next to last. Okay.

18 Q. Again, do you see there on the left side of
19 the page the Illinois River south of Siloam Springs
20 data?

21 A. I do.

22 Q. Let's look again at the year 2008. And would
23 you tell the court what the flow for that year was?
24 Are these average flows, by the way? I'm sorry.

25 A. Yeah. These are annual flows.

1 Q. Annual flows.

2 A. Average annual flows.

3 Q. Okay. That was a wet year, was it not?

4 A. Oh, it certainly was.

5 Q. And so the cubic feet per second went up?

6 A. It did.

7 Q. As did the total phosphorus in terms of
8 milligrams per liter?

9 A. Yes, it did.

10 Q. And so both flow and concentration went up?

11 A. Uh-huh.

12 Q. And as a result, the loading there in the
13 loading column went up; is that right?

14 A. It did.

15 Q. Okay.

16 A. Interestingly, if you look at the 2008 figure
17 and you go back up to, say, the 1990 and 1993 levels
18 where the flows were higher, it's interesting to note
19 that the loadings in 1990 was 0.2; in '93, it was .18;
20 and then in 2008, it was .15.

21 And as you pointed out, those are the three
22 wettest years that we've had, you know, in our listing
23 there. It's interesting to us that although the flows
24 are back in approaching those things, that the
25 concentrations of phosphorus are lower than they were

1 back a decade ago.

2 Q. Okay. Would that be in part because of the
3 reductions in the point-source discharge that you
4 talked about on direct?

5 A. Oh, certainly the advances that -- the
6 municipalities really should be commended for
7 the -- for the money that they've spent on phosphorus
8 reduction units, and I think that certainly a portion
9 of that has to be attributed to the nonpoint projects
10 that we've put in place, to the Nutrient Management
11 Plans, to the efforts that Arkansas has made to try to
12 reduce the phosphorus in the streams.

13 Q. Do you review the Oklahoma reports --

14 A. They're prepared by Oklahoma, but we do --
15 the engineering committee reviews those reports prior
16 to the meeting with the commissioners themselves and
17 we go over that. Then at the meeting itself, then the
18 total report is given to the commissioners.

19 Q. Do you recall that the report for calendar
20 year 2008 showed the phosphorus levels going up at all
21 of the Oklahoma stations?

22 MR. MCDANIEL: Objection; assumes facts
23 not in evidence.

24 MR. NANCE: I'm asking him if --

25 THE COURT: Overruled.

1 Q. (BY MR. NANCE) You can answer.

2 MR. MCDANIEL: Representation to the
3 witness as a fact.

4 THE COURT: Overruled.

5 A. Yeah. My memory is that that's true, that it
6 was. It's going to be interesting, I think, to see
7 what happens in 2009 because many stations in
8 Arkansas -- this is going to be the year of record for
9 rainfall. Little Rock had over 80 inches of rain.
10 Normally, Arkansas in this area, you know, we see 48
11 to 50 inches of rain. Be interesting to see what
12 happens this time on such an exceedingly wet year,
13 what happens to these next set of computations as we
14 go through those.

15 But if the point is, do we see more
16 phosphorus flow in wet years and less phosphorus flow
17 in dry years? The documentation certainly shows that.
18 That's a fact.

19 Q. And so you would not want the court to leave
20 today with the belief that the 40 percent reduction
21 figure has been arrived at and will be maintained
22 indefinitely into the future?

23 A. Oh, you can look at the records and say that
24 unless we have record years that keep going like this,
25 that the efforts underway have achieved that 40

1 percent reduction goal.

2 MR. NANCE: Judge, this would be where I
3 would transition, if you'd like to break for lunch.

4 THE COURT: Let's do so. Let's be back
5 at 1:15.

6 *(The proceedings were recessed)*

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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 4th day of January 2010.

s/ Brian P. Neil

Brian P. Neil, CSR-RPR, CRR, RMR
United States Court Reporter